Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1995

JOHN J. SHELSTAD, CHARLES E. MINSHEW and KEITH A. WATSON,

Petitioners,

v.

WEST ONE BANK (IDAHO) fka THE IDAHO FIRST NATIONAL BANK, a national banking association, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause and this Court's holding in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), were violated when the judge of the District Court was ordered by the Court of Appeals to be recused as a result of his close familial ties with two of the defendants, but his dispositive orders were not vacated because the plaintiffs only raised the subject with the District Court orally, but failed to file a written motion to that effect, prior to the District Court's dismissal of the plaintiffs' claims.

2. Whether the District Court has the unfettered discretion to waive the express and objective filing requirements of the removal statute, 28 U.S.C. § 1446, and deny a timely motion to remand pursuant to 28 U.S.C. § 1447.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The parties to the proceedings in the United States Court of Appeals for the Ninth Circuit, the Order of which is here for review, were:

1. Petitioners John J. Shelstad, Charles E. Minshew, and Keith A. Watson, Appellants in the Court of Appeals;

2. Respondents West One Bank (Idaho) fka the Idaho First National Bank; West One Bancorp fka Moore Financial Group, Inc.; James Stewart; Thomas F. Ripke; Harry Bettis; V. Dale Blickenstaff; J. Gordon Brookover; William S. Campbell; Thomas C. Frye; Janet S. Hay; Kenlon P. Johnson; James S. Kinney; Jack B. Little; Daniel R. Nelson; Allen T. Noble; Philip B. Soulen; Douglas H. Rae; Norman J. Schoonover; Richard A. Symms; William J. Deasy; Fred C. Humphreys; Robert J. Lane; and Edward A. Conforti, Appellees in the Court of Appeals.

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Pursuant to Part III of the Supreme Court Rules, John J. Shelstad, Charles E. Minshew and Keith A. Watson (hereinafter Shelstad) petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Alternatively, Shelstad requests that this Court summarily reverse the Ninth Circuit's failure to vacate all of the orders of Judge Lodge, because all of those orders were issued while Judge Lodge was presiding over this case in violation of 28 U.S.C. Sections 455(a) and (b).

OPINIONS BELOW

The Panel's Amended Memorandum and Memorandum were "Not for Publication" and appear as Exhibits A and B to the Appendix (App. 1 and 11). The Order denying the Renewed Petition for Rehearing and for Rehearing *en banc* was "Not for Publication" and appears in the Appendix as Exhibit C (App. 20). The decisions of the District Court and of the magistrate are not reported and appear in the Appendix as Exhibits D, E, and F (App. 21, 27 and 41). Attached as Exhibit L to the Appendix is the transcript of the in-chambers conference with the District Court on February 1, 1993, during which the Honorable Edward Lodge refused to recuse himself (App. 77).

JURISDICTION

The Court of Appeals entered its Order denying Appellants' petition for rehearing and rejecting the suggestion for rehearing *en banc* on November 7, 1995. This petition is timely under this Court's Rule 13.3. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

5th Amendment

> No person shall . . . be deprived of life, liberty or property without due process of law.

28 U.S.C. § 455(a)

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(b)

> He shall also disqualify himself in the following circumstances:
>
> > (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:
> >
> > (i) is a party to the proceeding, or an officer, director, or trustee of a party.

28 U.S.C. § 455

A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

28 U.S.C. § 1446

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a state court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1447

A motion to remand the case on the basis of any defect in removal procedure must be made

> within thirty days after the filing of the notice of removal under Section 1446(a). . . .

STATEMENT OF THE CASE

FACTUAL BACKGROUND

Idaho First National Bank, now West One Bank, entered into a Loan Agreement with Shelstad's corporation, Crew Concepts, Inc., (hereinafter CCI) on December 3, 1984, agreeing to loan CCI $657,000, and taking a security interest in the company's helicopter and a $15,000 savings account, and requiring the personal guarantees of the shareholders. The Loan Agreement had a maturity date of February 1, 1986. The bank committed itself to "provide financing for the year following February 1, 1986," subject to certain specified conditions.

On February 4, 1986, the Bank did loan CCI $590,000, the amount necessary to pay off the principal balance of the first loan. However, it refused to write that loan for the one-year term specified, instead imposing a maturity date of August 1, 1986, less than six months of the one-year term to which it had committed itself. It did reduce the interest rate charged from 1.5%, to 1%, plus the Bank of America Reference Rate. The Bank stated that it "hereby commits to provide financing on 8-1-86 to Crew Concepts, Inc. subject to the following:

> 1) Principal payment of $42,500 plus interest to date has been paid.
>
> 2) CPA prepared balance sheet and profit and loss statement plus a copy of the 1985 federal income tax returns must show adequate cash

flow to service the 1986 and 1987 debt payments.

3) The payments required for 1986-1987 will be a minimum debt service of one year's amortization based on a five-year amortization of the principal balance. In reestablishing the line, a full years revenue will be considered.

4) All past performance has been as agreed.

5) Security and guarantees to remain as they are currently.

6) A 30-day extension will be considered if the Financial Statements are not available on 8-1-86.

CREW CONCEPTS INC. will maintain all primary bank accounts with the Idaho First National Bank – Skyway-Vista Office."

On April 7, 1986, the Bank loaned CCI an additional $37,500 to allow CCI to purchase a used FLIR 2000A Thermal Infrared Imaging System and ground support equipment. That loan had a maturity date of September 1, 1986. The Bank again promised to renew that loan, provided that all payments of principal and interest had been made and, in the opinion of the Bank, "the company's financial position warrants renewal." Shelstad guaranteed this loan too.

CCI had correctly predicted that there would be a low fire year every three to four years. Because 1986 was a low fire year, in the fire cycle which the Shelstad explained to the Bank in 1984, revenues in 1986 dropped from $650,000 in the first nine months of 1985 to $285,000 in the first nine months. As Shelstad had again predicted, CCI revenues for 1987 increased to over one million dollars, and in 1988 to $3.4 million.

Ultimately, the Bank refused to honor its written commitment to renew the February 4, 1986 loan, although every objective criteria for renewal had been met. CCI had the same helicopter as collateral, $125,000 cash on hand, and personal guarantees, of $750,000 each, from the three shareholders. The Bank demanded that the shareholders infuse $375,000 new capital into the company, sell the helicopter or sell the company to pay the balance then due.

In the face of this demand, Shelstad, the sole shareholders of CCI, sold their shares of the company. They then paid the bank loan from the proceeds of sale.

COURSE OF PROCEEDINGS

Shelstad sued West One Bank (Idaho), its parent, West One Bancorp, and twenty-one of its officers and directors in state court in Idaho in August 1989. They asserted a variety of theories, including breach of contract, breach of the implied covenant of good faith and fair dealing implied in every contract, and violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1341, 1343, 1961, *et seq.*

Shelstad alleged that the Bank had undertaken a course of terminating $150,000,000 of loans in order to minimize its reserves for possible loan losses, called its Allowance for Loan and Lease Losses, which were and are a direct charge against the Bank's net income. At the same time, the Bank's parent forced the Bank to pay a dividend of $28 million to the holding company to fund its continued program of acquiring other banks in the

Northwest. Banking Circular #201 and SEC precedent establish that a bank's material understatement of its Allowance for Loan and Lease Losses constitutes a violation of Section 13(a) and Rules 12(b)-20 and 13(a)-1 of the Securities Exchange Act. 15 U.S.C. § 78m(a); 17 C.F.R. 240.12b-20 & 240.13a-1. *See, In the Matter of Texas Commerce Bancshares, Inc.*, SEA Release No. 24803, SEC Docket 1410 (Aug. 17, 1987); *see also Utica Bankshares Corp.*, SEA Release No. 20702, 29 SEC Docket 1479 (Feb. 29, 1984).

West One Bank (Idaho) and West One Bancorp were served with the summons and complaint August 17, 1989. In addition, at that time, corporate counsel stated that he would accept service for all but seven of the individual officers and directors who were personally named as defendants.

On September 15, 1989, only West One Bank (Idaho) filed a Petition for Removal to the United States District Court for the District of Idaho, where it was assigned to the Honorable Edward Lodge. On Monday, October 16, 1989, Shelstad timely filed a motion for remand, asserting *inter alia*, that not all of the served Defendants had joined in the Petition for Removal. On February 28, 1991, the magistrate denied the motion for remand, deciding that of the two corporate defendants and twenty-one named individual Defendants, twenty individual Defendants who had not been served as of the date of filing of the petition for removal could not properly join in the removal. App. 75. However, the magistrate was silent as to the other individual Defendant and the other corporation which had been served and had not joined or consented. *Id.*

The District Court adopted the magistrate's Report and Recommendation, over Shelstad's objection. App. 71. The District Court found that the magistrate had determined that the federal court had subject matter jurisdiction, that the procedural requirements of removal had been met, and that the Ninth Circuit allowed defendants to amend their removal notice to name appropriate defendants or to establish diversity jurisdiction. Stating only that the court had made an independent review of the record, the District Court adopted the Report and Recommendation of the Magistrate. App. 71.

Shelstad filed their Motion for Certification of Issue for Immediate Appellate Review of this decision on August 26, 1991. On February 26, 1992, Judge Lodge denied that motion, stating:

> Although it was argued and briefed by the parties, in denying the Shelstad's motion, Magistrate Williams did not specifically address the issue which Shelstad herein request to be certified. However, in granting the defendants' motion to amend their removal petition, the magistrate found that the defendants should be allowed to amend their notice of removal to reflect the appropriate defendants joining in the removal. This ruling thus allowed WOBC [West One Bancorp] to join in the removal petition, without finding the petition defective based on the fact that they had not previously been a party thereto.

App. 54.

On April 8, 1992, Shelstad submitted to the Ninth Circuit Court of Appeals their petition for a writ of mandamus, U.S. Court of Appeals Docket No. 92-70233.

They sought, by means of that writ, to compel the remand of the case to state court. The Ninth Circuit Court of Appeals denied that petition by Order dated May 29, 1992.

Defendants moved to dismiss parts of the complaint. The magistrate, accepting as true the Defendants' representations that no demands had been made on the Petitioners' guarantees, rather than the Petitioners' allegations, issued a Report and Recommendation which recommended granting the Defendants' motion. App. 40. The plaintiffs requested and were allowed to present oral argument. Subsequently, the District Court adopted the Magistrate's findings and conclusions and granted the Motion to Dismiss.

In December 1992, Shelstad learned that Judge Lodge had three close relatives employed with the defendants. Judge Lodge's sister-in-law, Sandra Lodge, at that time was a vice-president of West One Bancorp. The plaintiffs discovered that Judge Lodge's brother worked for West One Bank (Idaho), and that his nephew was employed as a loan officer at West One.

The plaintiffs presented this information to the Court on February 1, 1993. App. 77. As of the date of the hearing, the District Court had ruled on the defendants' first motion to dismiss, and allowed it; but he had not yet ruled on the defendants' second motion to dismiss. Judge Lodge conducted the proceeding in his chambers. During the hearing, the Court acknowledged that he was aware of his relatives employment with West One (although he stated that he was unaware of his sister-in-law's job title). Judge Lodge then ruled from the bench that he would not

recuse himself as a consequence of his close relatives employment status with the defendants:

> It puts the Court in an awkward situation because I am very sensitive to these issues and always have been. I have familiarized myself with these particular sections and you read the sections. For the record, there is no disqualification; 455 addresses itself to impartiality that might reasonably be questioned . . . .
>
> * * *
>
> But I am not about to disqualify myself in this case because I have handled cases involving West One and I am confident I have ruled for them as well as against them. So if I would step down, it would not look very good. If I bowed out, then I think maybe people in the past would feel they were treated unfairly.
>
> In my judgment there is absolutely no disqualification under the code. In addition, the only other District Judge in the State of Idaho is disqualified because of some relationship he has, which puts some greater burden on this Judge to handle these cases.

App. 84, 85. The Court did give the plaintiffs leave to depose his relatives on the subject of their employment relationships with the defendants. App. 90-92.

On June 18, 1993, the Magistrate issued a Report and Recommendation on the Defendants' second motion to dismiss, which recommended the dismissal of the Shelstad's remaining claims. App. 40. Shelstad objected to the report and recommendation and requested oral argument.

Shelstad conducted discovery concerning the employment of the Judge's relatives over several months. Shelstad's counsel met with Judge Lodge and Defendants' counsel on October 22, 1993, once again in the judge's chambers, to discuss the Judge's relatives who worked at West One Bank or West One Bancorp. The Court did not put this hearing on the record, and no transcription of it exists. On November 2, 1993, Judge Lodge issued an order denying the plaintiffs' request for oral argument and adopting the Report and Recommendation and dismissing the remainder of their claims. App. 25.

On November 5, 1993, Shelstad filed a written Motion to Disqualify Presiding Judge and for Relief from Prior Orders. On January 24, 1994, the District Court denied that motion.

Shelstad appealed. On June 28, 1995, the Ninth Circuit affirmed in part and reversed in part. App. 11. A majority found that ***Judge Lodge*** properly had "waived" Shelstad's right to remand the case to state court. App. 12. The panel also unanimously concluded that Judge Lodge should have recused himself after being informed that he had three relatives who were employed by the defendant corporations – the very same grounds which the plaintiffs had raised at the in-chambers conference on Februay 1, 1993. App. 15-16. The majority ruled that the February 1, 1993 in-chambers conference between the parties and the Court, in which the employment of the relatives at the Bank, and the possible status of those relatives as officers of the Bank, were discussed, was not sufficient to inform Judge Lodge of the grounds for his recusal. App. 15. According to the majority, Judge Lodge

was not sufficiently on notice of the grounds for his recusal until after the plaintiffs filed their written motion on November 4, 1993.

Judge Skopil, concurring in part and dissenting in part, concluded that Shelstad apprised the Judge of the ground for recusal within a reasonable time after discovery and before the Judge's adverse ruling. App. 16-19. In a thoughtful memorandum, Judge Skopil explained that all of the Judge's rulings should have been vacated.

Petitioners sought a rehearing and rehearing *en banc*. On or about July 11, 1995, they sought leave to supplement the record with newly discovered evidence, certified copies of a motion for disqualification of Judge Lodge and others in *West One Bank Idaho N.A. v. Haynes*, Case No. CIV 91-392 N EJL, another case involving West One Bank over which Judge Lodge presided. The record in the *Haynes* case revealed that the defendants requested Judge Lodge to recuse himself due to his familial ties with West One at the same time that Shelstad raised the issue with the Court in this case. The Ninth Circuit denied the motion by Order entered on August 17, 1995; a subsequent renewed petition for rehearing and rehearing *en banc* was denied on November 7, 1995. App. 20. The Panel issued its Amended Memorandum on September 27, 1995. App. 1. It changed the authority for its position that the timeliness of a removal petition may be waived to *Fristoe v. Reynolds Metal Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980). App. 2. The majority also expanded on its discussion of the recusal issue, highlighting the discovery that the Petitioners undertook in March 1993 and suggesting that Shelstad did not reveal to Judge Lodge the results of that discovery – that his sister-in-law was an

officer of the Bancorp, at an in-chambers conference held October 22, 1993. App. 4.

ARGUMENT FOR ALLOWANCE OF WRIT

I. ALL OF THE DISTRICT COURT'S ORDERS SHOULD BE VACATED.

This case presents this Court with the opportunity to close a gap created by its decision in the landmark case of *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) – to wit, once grounds for recusal have been established, at what point in time in a case should a judge be recused, and his subsequent orders vacated, when selecting a remedy for a violation of § 455.

The Ninth Circuit panel unanimously concluded that Judge Lodge was required to recuse himself pursuant to 28 U.S.C. § 455(a) as a result of his close familial ties to the defendants. App. 6. This Court affords "due consideration" to the choice of remedy fashioned by the Court of Appeals when determining whether § 455 has been violated. *Liljeberg*, 486 U.S. at 862. The remedy chosen by the Ninth Circuit was recusal and vacating the Court's orders after the plaintiffs' filed their motion to recuse; due process requires, under the circumstances of this case, that all of the Court's dispositive orders be vacated.

Despite an unanimous finding that Judge Lodge should have recused himself, the majority concluded that Judge Lodge was under no duty to do so until after the plaintiffs presented him with a written motion stating the

"obvious grounds" for recusal. App. 5. The Ninth Circuit determined that the "obvious grounds" for recusal were the employment of the judge's brother, nephew and sister-in-law by two of the defendants. App. 6. However, the majority ignores the fact that the plaintiffs orally presented to Judge Lodge these very grounds for recusal at an in-chambers conference on February 1, 1993. App. 79, 85. This holding by the Ninth Circuit violates due process and the spirit, if not the letter, of the *Liljeberg* decision.

The right to an impartial judge is a "constitutional right[ ] so basic to a fair trial that [its] infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23 and n. 8 (1967). In *Liljeberg, supra*, this Court noted that doubts and concerns about the integrity of judges can rise to levels of constitutional concerns.

> The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.' "

Liljeberg, 486 U.S. at 865, n. 12, *quoting Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

The majority opinion ignores – if not eviscerates – Judge Lodge's independent duty to recuse himself. The Court is under an absolute duty to investigate and be aware of the employment status of his close relations. Under 28 U.S.C. § 455(b)(5)(i), each federal court judge is charged with knowing whether "he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person is a party to the proceeding, or an officer, director, or trustee of a party."

As this Court indicated in *Liljeberg*, each member of the federal bench has an obligation to ascertain the nature and extent of relationships which might implicate Section 455. *Liljeberg*, 486 U.S. at 851-852. The majority has shifted this burden of investigation away from where it belongs and onto vulnerable parties-litigant.[1]

Judge Skopil in dissent correctly determined that following the February 1, 1993, in-chambers conference, Judge Lodge was sufficiently apprised of obvious grounds to trigger his duty to recuse himself, pursuant to 28 U.S.C. § 455(a). App. 7-10. The uncontested record reflects that the plaintiffs promptly raised with Judge Lodge the subject of his close familial ties to the defendants. At the hearing on February 1, 1993, counsel for the plaintiffs notified Judge Lodge that they recently had learned of the judge's connections to the defendants, and they suggested that the Court exercise his self-enforcing duty to recuse himself. Judge Lodge – who at that point had issued no dispositive orders in the case – acknowledged that his brother, nephew and sister-in-law were employed by West One and refused plaintiffs' request that he be recused. App. 79, 84-85.

The majority erred by ruling that the plaintiffs had failed to present the Court with "obvious grounds" for recusal. Once the subject was raised by the plaintiffs, Judge Lodge – at a bare minimum – had an obligation to determine whether any of his close relatives were an

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[1] By the majority's approach, litigants always should consider utilizing discovery to ascertain whether conficts of interest exist between the Court and any other party. Such a result does grievous harm to the integrity of the judicial system.

officer of either corporation. 28 U.S.C. § 455(b)(5)(i). Had he done so, Judge Lodge would have learned that his sister-in-law, a vice-president of West One Bancorp during the course of this litigation, was an officer of a defendant corporation.

The Ninth Circuit made no mention of this obvious violation by Judge Lodge of § 455(b). The Court of Appeals chose to ignore this issue and clear statutory violation.

The majority's holding that some, but not all, of Judge Lodge's orders should be vacated defies common sense and due process. If the employment relationships of Judge Lodge's close relatives were such as to give rise to his duty to recuse himself after a written motion was presented, how could those relationships not give rise to the judge's duty to recuse himself at the outset of the case? And, in the context of this case, the plaintiffs raised the issue orally as soon as they became aware of the grounds for recusal. Once the Ninth Circuit vacated any of Judge Lodge's orders, justice required the Court of Appeals to vacate all of his orders. As this Court has stated repeatedly, "justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. 133, 136 (1955) (citation omitted), *quoted in Liljeberg*, 486 U.S. at 865, n. 12. This Court in *Liljeberg* mandated that the courts must continually bear this in mind. *Id.* at 864.

Although the issue of when a duty to recuse is triggered is not addressed squarely in *Liljeberg*, the three-part test for the fashioning of a remedy as outlined in the case

strongly suggests that, in this case, Judge Lodge had a duty to recuse himself from the outset of the case.

> [I]n determining whether a judgment should be vacated for a violation of Section 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of under-mining the public's confidence in the judicial process.

Liljeberg, 486 U.S. at 864. Although the majority makes no mention of this test in the Amended Memorandum, by ordering Judge Lodge to be recused and vacating his award of attorneys' fees to the defendants, the Ninth Ciruit must have ascertained that Judge Lodge's ties to the defendants were a violation of the *Liljeberg* standard.

To not vacate all of the orders Judge Lodge entered is to suggest to the judiciary, and more importantly to the public who depends on a fair and impartial judiciary, that if judges keep Section 455(a) conflicts under wraps, they can preside over cases in violation of Section 455(a), at least until someone fortuitously stumbles across the facts. If by that time the key issues have been decided, then so be it. "People who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. [Footnote omitted.]" 486 U.S. at 864-865. Allowing Judge Lodge's orders to stand would give validity to those suspicions and doubts.[2]

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[2] Judge Lodge also apparently neglected to request an advisory opinion from the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States. *Cf. In re Cement Antitrust Litigation*, 515 F. Supp. 1076 (D. Ariz. 1981);

Judge Lodge understood the concerns and the requirements of Section 455(a); at the February 1, 1993, conference, he stated that he was "not about to disqualify himself in this case" and that there was "absolutely no [basis for] disqualification under the code." He expressed concern that "if I would step down, it would not look very good. If I bowed out, then I think maybe people in the past would feel they were treated unfairly." App. 85. These concerns of Judge Lodge may well be accurate, but they are not a relevant consideration. What they are is an acknowledgement by Judge Lodge that he was aware of the scope of the problem, but unwilling to do anything about it.[3]

These Petitioners made a timely request for relief. *See* Judge Skopil's opinion, concurring in part and dissenting in part, App. 9. They informed the District Court of their concerns under Section 455(a) on February 1, 1993, within six weeks after they learned of the employment of his relatives by the Defendant corporations.

The panel unanimously ruled that the District Court was wrong, and that there was absolutely a requirement for disqualification. Having made that determination, the majority simply failed to properly analyze and apply this

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aff'd In re Cement Antitrust Litigation, 688 F.2d 1297 (9th Cir. 1982); *In re Bernard*, 31 F.3d 842 (9th Cir. 1994).

[3] It is important to note that at least one other litigant before Judge Lodge discovered his close familial ties to West One, and tried to do something about it. However, Judge Lodge denied that motion to recuse. He also said nothing to Shelstad about the coterminus incident.

Court's direction in *Liljeberg*. This Court now has the opportunity to clarify the holding and reasoning in *Liljeberg* to mean – once recusal has been ordered – that due process requires all dispositive orders to be vacated once the grounds for recusal should be obvious to the ***judge***, rather than the parties as the Ninth Circuit would have it. The majority reached the inconsistent conclusion that Judge Lodge – who would have been required to recuse himself if only the plaintiffs had filed a written memorandum to that effect on or about February 1, 1993 – could dismiss the plaintiffs' claims, but could not decide the amount of costs and attorney fees which Shelstad would pay the defendants, because that might "undermine the public's confidence in the judicial process." This holding – kept from the public in a "not for publication" memorandum – is absurd and must be overturned in order to restore the public's confidence in the integrity of the judiciary.

II. The Defendant's Removal Petition Was Fatally Flawed.

The Ninth Circuit's holding that the Bank's untimely removal petition from state court is permissible because Judge Lodge had the unfettered discretion to waive the 30-day time limit for removal is unfounded and unwise. App. 2. It also is in stark contrast to the Supreme Court and virtually every other court which has dealt with the issue.

Although the time limit for removal is not jurisdictional, this Court and others have consistently held that it

is to be construed strictly in favor of state court jurisdiction, and any doubts are to be resolved in favor of the party seeking remand. "Removal jurisdiction is statutory and strictly construed." *Gould v. Mutual Life*, 790 F.2d 769, 773 (9th Cir. 1986).[4]

Contrary to the Ninth Circuit's conclusion – that the trial judge has the discretion to waive an untimely filing of a removal petition – only the plaintiff may waive the timeliness requirement in § 1446(b). "The plaintiff has a right to remand if the defendant did not take the right steps when removing, but the plaintiff may also accept the defendant's choice of a federal forum." *In the Matter of Continental Cas. Co.*, 29 F.3d 292, 294 (7th Cir. 1994) (Easterbrook, J.). "A plaintiff may forgive the procedural defect and accept the defendant's preference of a federal forum." *Page v. City of Southfield*, 45 F.3d 128, 134 (6th Cir. 1995).[5]

In support of its position, the Ninth Circuit misplaced reliance upon its earlier decision in *Fristoe v.*

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[4] *See also Shamrock Oil & Gas Co.*, 313 U.S. 100, 108-09 (1941) (removal statute strictly construed); *U.S. v. Gunn*, 511 F.2d 1024, 1027-28, *cert. denied*, 423 U.S. 849 (1975) (removal petition must strictly comply with provisions of 28 U.S.C. § 1446; the failure to follow objective requirements in statute renders petition defective and removal unacceptable).

[5] The Court's ruling that a trial court has the discretion to waive the 30-day requirement is inconsistent with the recent holdings of the Fifth, Sixth and Seventh Circuits that courts do not have the *sua sponte* right to remand an untimely removed case. *Continental, supra; Page, supra; In re Allstate*, 8 F.3d 219 (5th Cir. 1993). As explained above, only plaintiffs have the right to seek remand of a case removed pursuant to a defective removal petition.

Reynolds Metal Co., 615 F.2d 1209, 1212 (9th Cir. 1980). In *Fristoe*, the untimely removal, one day late, was not contested until the appeal was taken. The *Fristoe* Court acknowledged that "[t]he statutory time limit for removal petitions is merely a formal and modal requirement and is not jurisdictional. [Citations omitted.]" 615 F.2d at 1212. It stated that "[a]lthough the time limit is mandatory and a timely objection to a late petition will defeat removal, a party may waive the defect or be estopped from objecting to the untimeliness by sitting on his rights." *Id.* It held that "[w]hen a case such as this has been removed and tried 'on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction . . . . '" [Citation omitted.] *Id.*

If this is the analysis which the majority used to justify the removal in this case, it misses the mark. As mandated by 28 U.S.C. § 1447(c), plaintiffs had timely filed a motion for remand on Monday, October 16, 1989, thirty days (extended by the weekend) after West One Bank (Idaho) alone petitioned for removal. Once the remand was denied, Shelstad both sought certification of the issue for immediate appeal and sought a writ of mandamus to compel the remand. Neither Judge Lodge nor the Magistrate suggested that Shelstad had waived a right to remand, or discussed any "knowing intentional relinquishment of a known right."

Fristoe also included a discussion of whether all served defendants had joined in the removal petition, acknowledging the general rule that all defendants who

may properly join in removal must join. *Fristoe*, 615 F.2d at 1213. There is no question here that all defendants who properly could have joined in removal did not do so.

> A federal court's jurisdiction under the removal statutes constitutes an infringement upon state sovereignty. [Citations omitted.] Consequently, the statutory provisions regulating removal must be strictly applied. A federal court should not extend its jurisdiction beyond the boundaries drawn by those provisions. [Citation omitted.] It follows, then, that federal jurisdiction over cases removed from state court should be rejected where the propriety of removal is doubtful.

Fellhauer v. City of Geneva, 673 F. Supp. 1445, 1447 (N.D. Ill. 1987).

> To permit amendments in situations such as the present one would strip the 30 day period requirement in 28 U.S.C. Section 1446(b) of its effectiveness. Requiring parties to timely voice their consent to removal, a relatively unburdensome task, is preferable to protracted after-the-fact judicial determinations upon a motion to amend.

Mason v. International Business Machines, Inc., 543 F. Supp. 444, 446 (M.D.N.C. 1982).

Thus the Ninth Circuit obliterated the plain meaning of a clear and unambiguous statute and created a new, discretionary right for judges to waive statutory requirements, apparently – given the lack of any articulated standard by the Court – whenever the judge sees fit to do so. And the Ninth Circuit has placed this heretofore unknown discretion with a judge who, by the majority's

own ruling, should have recused himself from the case. This holding renders meaningless the 30-day time limit in § 1446(b), and further undermines the public's confidence in the judicial process. Shelstad's timely motion to remand should have been granted, and this Court should either do so summarily, or address the situation through the issuance of a writ of certiorari.

CONCLUSION

Shelstad respectfully requests that this Court issue its writ of certiorari to the Ninth Circuit in this case. Significant issues of concern to the judiciary, the legal profession and the public, whose perception of justice in our legal system is essential to the working of our legal system, are at stake. This Court should address the due process rights of all litigants to have their causes determined by a judge who is fair and impartial, both in fact and in appearance, and the obligation of a judge to make appropriate disclosure of any facts which may raise any question of impartiality or the appearance of impartiality. This Court should address the right of a plaintiff to the forum of its choice, if the defendants fail to strictly comply with the objective requirements of the removal statute.

In the event that this Court determines that certiorari should not be granted, this Court should exercise its authority to correct the lower court's clear error and grant a summary reversal of the Ninth Circuit's decision to not vacate all orders of Judge Lodge and to not order this case remanded to state court. Without question,

Judge Lodge had no authority to waive Shelstad's right to remand.

This Court's reversal on this ground, with an order directing that Shelstad's motion to remand to state court be granted, would resolve, if only for this case, Shelstad's due process rights to a determination of his cause free from the appearance of partiality which taints Judge Lodge's orders on the merits. This Court could also summarily reverse for the reasons stated in Judge Skopil's opinion, concurring in part and dissenting in part. That would result in the vacating of all of Judge Lodge's orders and having the parties present their arguments for decision by a new judge bringing the appearance, as well as the fact, of impartiality to the task.

RESPECTFULLY SUBMITTED this 5th day of February, 1996

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Appendix

A. Amended Memorandum of the Panel, filed September 27, 1995 ..... App. 1

B. Memorandum of the Panel, filed June 28, 1995 ..... App. 11

C. U.S. Court of Appeals Order, dated November 7, 1995 ..... App. 20

D. U.S. District Court Memorandum and Order, filed November 2, 1993 ..... App. 21

E. U.S. District Court Report and Recommendation, filed June 18, 1993 ..... App. 27

F. Order of the District Court, dated September 2, 1992 ..... App. 41

G. U.S. Court of Appeal Order, dated May 29, 1992 ..... App. 51

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN L. SHELSTAD; CHARLES E. MINSHEW; KEITH A. WATSON, Plaintiffs-Appellants, v. WEST ONE BANK, fka THE IDAHO FIRST NATIONAL BANK, a national banking association; WEST ONE BANCORP, fka Moore Financial Group, Inc., et al., Defendants-Appellees.	No. 94-35275 D.C. No. CV-89-01248-EJL AMENDED MEMORANDUM* (Filed Sep. 27, 1995)

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted May 3, 1995
Seattle, Washington
Filed June 28, 1995
Amended September 27, 1995

Before: WRIGHT, SKOPIL and THOMPSON, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

The court rejected plaintiffs' motion to remand the case to state court and denied their recusal motion. It also dismissed plaintiffs' claims and awarded fees to defendants. Plaintiffs appeal. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, remand in part and award fees.

1. REMOVAL

Although the amended removal petition was untimely under 28 U.S.C. § 1446(b), that 30 day limit is a formality that may be waived and it is not a jurisdictional barrier. *Fristoe v. Reynolds Metal Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980). The court was required to remand to state court only if it lacked subject matter jurisdiction. 28 U.S.C. § 1447(c). It had jurisdiction under 28 U.S.C. § 1331 and did not err in waiving the time limit. *See Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir. 1994) (denial of motion to remand is reviewed de novo).[1]

2. DISMISSAL OF CLAIMS

We review de novo a dismissal pursuant to Fed. R. Civ. P. 12(b)(6). *Everest and Jennings v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). And we review standing de novo. *Crow Tribe of Indians v. Campbell Farming Corp.*, 31 F.3d 768, 769 (9th Cir. 1994).

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[1] This conclusion moots the two issues regarding the original removal petition.

Johnston v. Oregon Bank, 591 P.2d 746 (Or. 1979), is instructive as to breach of guaranty claims. There, the court held that:

> [T]he bank does not have an obligation to plaintiff based upon his guaranty to it for the kind of damages now in issue because such damages did not flow from the breach of the guaranty agreement. The damages would have occurred to plaintiff just the same in the absence of any guaranty. The damage to plaintiff resulted from plaintiff's interest in the lumber company as well as his contractual relations with other creditors and from the lumber company's bankruptcy and inability to pay its obligations, which bankruptcy was, in turn, caused by the bank's breach of its agreement with the lumber company or was the result of business relations with others for the lumber company's benefit. It was not the result of his guaranty to the bank.

Id. at 748. As in *Johnston*, the damage alleged by plaintiffs could only be the result of breach of the loan agreements, and not breach of the guarantees. The court properly dismissed the claim for breach of the guarantees.

The Idaho courts have never recognized duress as an affirmative cause of action and they have not indicated that they would do so. Furthermore, the majority rule is that duress is not an affirmative cause of action. *Prosser & Keeton On Torts*, § 18 at 121 (5th ed. 1984). The court properly dismissed the duress claim.

A shareholder or guarantor lacks standing to assert fraud or RICO claims where the harm alleged is derivative of harm to the corporation. *See Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 640 (9th Cir. 1988). Plaintiffs

have failed to show injury distinct from that to other shareholders or the existence of a special duty owed to them by the Bank. *See id.* The court properly found a lack of standing.

3. RECUSAL

a. Background

On February 1, 1993, during a conference in chambers, plaintiffs notified Judge Lodge that his brother and nephew were employees of West One. Judge Lodge acknowledged that his brother was an agricultural representative for the bank and that his nephew was a loan officer. Further, Judge Lodge indicated that his sister-in-law, Sandra Lodge, had worked for West One, but that he did not know the nature of her position or whether she still worked for the bank. Judge Lodge granted plaintiffs' request for further discovery on the matter.

Plaintiffs deposed Sandra Lodge on March 12, 1993. She indicated that she had been a vice-president of West One until 1991.

Plaintiffs assert that during an off-the-record conference in chambers on October 22, 1993, they raised the recusal issue again. Nothing indicates that plaintiffs there informed the judge about his sister-in-law's former position with West One.

On November 2, 1993, Judge Lodge dismissed plaintiffs' complaint. On November 5, 1993, plaintiffs filed a motion requesting that Judge Lodge recuse himself and that his prior orders be vacated. One of the grounds

plaintiffs listed was that Sandra Lodge had been a vice-president of West One.

b. Failure to recuse after the February 1 conference

During the February 1, 1993, conference in chambers, plaintiffs notified Judge Lodge that some of his relatives worked for West One, triggering his duty to determine whether recusal was proper under § 455(a). Based on the information before him, Judge Lodge determined that recusal was not required. *See United States v. Sibla*, 624 F.2d 864, 867-68 (9th Cir. 1980).

Because plaintiffs never moved for recusal during the February 1 conference,[2] they "bear a greater burden on appeal in demonstrating that the judge committed reversible error in failing to grant recusal under section 455." *Id.* at 868. *Cf. United States v. Schreiber*, 599 F.2d 534 (3d Cir.) (using the plain error standard), *cert. denied*, 444 U.S. 843 (1979). The information presented at the February 1 conference did not present "obvious grounds for recusal under section 455 . . . . " *Sibla*, 624 F.2d at 868. Consequently, Judge Lodge's failure to recuse himself was not reversible error.

---

[2] Plaintiffs contend that Judge Lodge denied oral requests for recusal on two prior occasions, but the record shows that plaintiffs' actions never amounted to a request. Rather, discovery on the issue was discussed in proceedings before the court on February 1, 1993, and Judge Lodge there refrained from recusing himself. The October 22, 1993, conference was held off the record.

c. Denial of plaintiffs' recusal motion

Although 28 U.S.C. § 455 is self-enforcing on the part of the judge, a party having information that raises a possible ground for disqualification may not wait until after an unfavorable judgment to bring the information to the judge's attention. *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992). A recusal motion must be made with reasonable promptness after the ground for such a motion is ascertained. *Id.* (citation and internal quotations omitted). Plaintiffs did not move for disqualification until nearly eight months after they ascertained the grounds set forth in their motion and after the court dismissed their claims. Not until then did they fully explain why Judge Lodge should have recused himself. The court did not abuse its discretion in finding the motion untimely and denying relief from its prior orders dismissing the claims. *See Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993).

Judge Lodge abused his discretion, however, by failing to recuse himself when the motion was finally filed. He was then fully apprised of the grounds for recusal. A reasonable person would question his impartiality because his brother, sister-in-law and nephew were employees of West One at one time or another while this case was before him. 28 U.S.C. § 455(a).

4. ATTORNEY'S FEES

Because the judge abused his discretion in failing to recuse himself when the motion for recusal was filed, we vacate his subsequent order awarding attorney's fees to defendants. We remand this question to a different judge.

We do this to prevent "undermining the public's confidence in the judicial process." *Liljeberg v. Health Srvcs. Acquisition Corp.*, 486 U.S. 847, 864 (1988).

As to fees on appeal, because defendants are the prevailing parties, they will be awarded attorney's fees. *Spidell v. Jenkins*, 727 P.2d 1285, 1289 (Idaho App. 1986).

AFFIRMED in part and REMANDED in part.

Shelstad v. West One Bank, No. 94-35275

(Filed Sep. 27, 1995)

SKOPIL, Senior Circuit Judge, concurring in part and dissenting in part:

I agree that Judge Lodge abused his discretion by failing to recuse himself. Therefore, I concur with the majority's decision to reverse and remand the award of attorney's fees. I disagree, however, with the majority's conclusion that Judge Lodge was not required to recuse himself until after the filing of plaintiffs' written motion.

The record shows that plaintiffs learned in late 1992 that some of Judge Lodge's relatives were employed by defendants. Plaintiffs presented their concerns and requested discovery during a meeting with the judge and opposing counsel on February 1, 1993. Judge Lodge acknowledged at this meeting that his brother and nephew worked for defendants. Judge Lodge also indicated that his sister-in-law had worked for defendants, but that he was not sure of her position or whether she

was still employed there. There was another meeting between the parties and the judge in October 1993, which was off the record, but apparently also concerned recusal. Judge Lodge dismissed plaintiffs' claims shortly after this second meeting. Plaintiffs filed a motion three days later to recuse Judge Lodge on the ground that his sister-in-law was a vice president of the bank, his nephew was a loan officer of the bank, and his brother was also employed by the bank.

The majority concludes that this information presented "potential" but not "obvious" grounds for recusal pursuant to 28 U.S.C. § 455. I disagree. Section 455 provides:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> * * *
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:
>
> (i) is a party to the proceeding, or an officer, director, or trustee of a party.

These sections are self-enforcing by a judge, and accordingly require no motion by a party. *United States v. Sibla*, 624 F.2d 864, 867-69 (9th Cir. 1980). When a party has information raising a possible ground for recusal, however, we require that party to file a motion to recuse "with reasonable promptness after the ground for such a

motion is ascertained." *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992) (internal quotation omitted). The purpose is to prevent litigants from using recusal motions for strategic purposes. *Id.* Thus, when a party knows of a possible ground for recusal but fails to inform the judge until after an adverse ruling is rendered, we have found such motions untimely and denied relief. *See, e.g., id.; United States v. Conforte*, 624 F.2d 869, 879-80 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980).

The present case is in contrast to those cases, where the grounds for recusal were revealed to the court for the first time in the parties' motions. While plaintiffs here did not file a recusal motion immediately upon learning of the ground supporting recusal, and indeed not until the judge rendered an adverse ruling, plaintiffs nevertheless apprised Judge Lodge of the ground for recusal within a reasonable time of its discovery and before the judge's adverse ruling. This notice was sufficient to trigger Judge Lodge's responsibility to inquire independently whether recusal was required. *See Sibla*, 624 F.2d at 868-69. Consequently, I believe the proper course is to consider whether Judge Lodge erred by failing sua sponte to recuse himself.

Defendants argue that sua sponte recusal pursuant to section 455(b)(5)(i) was not warranted by the fact that Judge Lodge's relatives were employed by the bank. It is not necessary to examine the precise contours of section 455(b)(5)(i), however, because section 455(a) provides that the mere *appearance* of partiality requires recusal. "The standard for judging the appearance of partiality requiring recusal under 28 U.S.C. § 455 is an objective one and involves ascertaining whether a reasonable person with

knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Preston v. United States*, 923 F.2d 731, 734 (9th Cir. 1991) (internal quotation omitted). Judge Lodge acknowledged at the February conference that his relatives were employed by defendants. The information relevant to determining whether recusal was required was either within the judge's knowledge at that time or within easy reach. Therefore, I disagree that Judge Lodge was not aware of obvious grounds until after the written motion was filed. I would reverse all of Judge Lodge's rulings and remand for further proceedings before a different judge.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN L. SHELSTAD; CHARLES E. MINSHEW; KEITH A. WATSON, Plaintiffs-Appellants, v. WEST ONE BANK, fka THE IDAHO FIRST NATIONAL BANK, a national banking association; WEST ONE BANCORP, fka Moore Financial Group, Inc., et al., Defendants-Appellees.	No. 94-35275 D.C. No. CV-89-01248-EJL MEMORANDUM* (Filed Jun. 28, 1995)

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted May 3, 1995
Seattle, Washington

Before: WRIGHT, SKOPIL and THOMPSON, Circuit Judges.

The court rejected plaintiffs' motion to remand the case to state court and denied their recusal motion. It also

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dismissed plaintiffs' claims and awarded fees to defendants. Plaintiffs appeal. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, remand in part and award fees.

1. REMOVAL

Although the amended removal petition was untimely under 28 U.S.C. § 1446(b), that 30 day limit is a formality that may be waived and it is not a jurisdictional barrier. *Glover v. W. R. Grace & Co.*, 773 F. Supp. 964, 965 (E.D. Tex. 1991). The court was required to remand to state court only if it lacked subject matter jurisdiction. 28 U.S.C. § 1447(c). It had jurisdiction under 28 U.S.C. § 1331 and did not err in waiving the time limit. *See Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir. 1994) (denial of motion to remand is reviewed de novo).[1]

2. DISMISSAL OF CLAIMS

We review de novo a dismissal pursuant to Fed. R. Civ. P. 12(b)(6). *Everest and Jennings v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). And we review standing de novo. *Crow Tribe of Indians v. Campbell Farming Corp.*, 31 F.3d 768, 769 (9th Cir. 1994).

Johnston v. Oregon Bank, 591 P.2d 746 (Or. 1979), is instructive as to breach of guaranty claims. There, the court held that:

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[1] This conclusion moots the two issues regarding the original removal petition.

> [T]he bank does not have an obligation to plaintiff based upon his guaranty to it for the kind of damages now in issue because such damages did not flow from the breach of the guaranty agreement. The damages would have occurred to plaintiff just the same in the absence of any guaranty. The damage to plaintiff resulted from plaintiff's interest in the lumber company as well as his contractual relations with other creditors and from the lumber company's bankruptcy and inability to pay its obligations, which bankruptcy was, in turn, caused by the bank's breach of its agreement with the lumber company or was the result of business relations with others for the lumber company's benefit. It was not the result of his guaranty to the bank.

Id. at 748. As in *Johnston*, the damage alleged by plaintiffs could only be the result of breach of the loan agreements, and not breach of the guarantees. The court properly dismissed the claim for breach of the guarantees.

The Idaho courts have never recognized duress as an affirmative cause of action and they have not indicated that they would do so. Furthermore, the majority rule is that duress is not an affirmative cause of action. *Prosser & Keeton On Torts*, § 18 at 121 (5th ed. 1984). The court properly dismissed the duress claim.

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them by the Bank. *See id.* The court properly found a lack of standing.

3. RECUSAL

a. Failure to recuse after the February 1 conference

During the February 1, 1993, conference in chambers, plaintiffs notified Judge Lodge that some of his relatives worked for West One,[2] triggering his duty to determine whether recusal was proper under § 455(a). Based on the information before him, Judge Lodge determined that recusal was not required. *United States v. Sibla*, 624 F.2d 864, 867-68 (9th Cir. 1980).

Because plaintiffs never moved for recusal during the February 1 conference,[3] they "bear a greater burden on appeal in demonstrating that the judge committed reversible error in failing to grant recusal under section 455." *Id.* at 868. *Cf. United States v. Schreiber*, 599 F.2d 534 (3d Cir.) (using the plain error standard), *cert. denied*, 444 U.S. 843

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[3] Plaintiffs contend that Judge Lodge denied oral requests for recusal on two prior occasions, but the record shows that plaintiffs' actions never amounted to a request. Rather, discovery on the issue was discussed in proceedings before the court on February 1, 1993, and Judge Lodge there refrained from recusing himself. The October 22, 1993, conference was held off the record.

(1979). The information presented at the February 1 conference did not present "obvious grounds for recusal under section 455 . . . . " *Sibla*, 624 F.2d at 868. Consequently, Judge Lodge's failure to recuse himself was not reversible error.

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Judge Lodge abused his discretion, however, by failing to recuse himself when the motion was finally filed. He was then fully apprised of the grounds for recusal. A reasonable person would question his impartiality because his brother, sister-in-law and nephew were employees of West One. 28 U.S.C. § 455(a).

4. ATTORNEY'S FEES

Because the judge abused his discretion in failing to recuse himself when the motion for recusal was filed, we vacate his subsequent order awarding attorney's fees to defendants. We remand this question to a different judge.

As to fees on appeal, because defendants are the prevailing parties, they will be awarded attorney's fees. *Spidell v. Jenkins*, 727 P.2d 1285, 1289 (Idaho App. 1986).

AFFIRMED in part and REMANDED in part.

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These sections are self-enforcing by a judge, and accordingly require no motion by a party. *United States v. Sibla*, 624 F.2d 864, 867-69 (9th Cir. 1980). When a party has information raising a possible ground for recusal, however, we require that party to file a motion to recuse "with reasonable promptness after the ground for such a motion is ascertained." *E. & J. Gallo Winery v. Gallo Cattle*

Co., 967 F.2d 1280, 1295 (9th Cir. 1992) (internal quotation omitted) . The purpose is to prevent litigants from using recusal motions for strategic purposes. *Id.* Thus, when a party knows of a possible ground for recusal but fails to inform the judge until after an adverse ruling is rendered, we have found such motions untimely and denied relief. *See, e.g., id.; United States v. Conforte*, 624 F.2d 869, 879-80 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980).

The present case is in contrast to those cases, where the grounds for recusal were revealed to the court for the first time in the parties' motions. While plaintiffs here did not file a recusal motion immediately upon learning of the ground supporting recusal, and indeed not until the judge rendered an adverse ruling, plaintiffs nevertheless apprised Judge Lodge of the ground for recusal within a reasonable time of its discovery and before the judge's adverse ruling. This notice was sufficient to trigger Judge Lodge's responsibility to inquire independently whether recusal was required. *See Sibla*, 624 F.2d at 868-69. Consequently, I believe the proper course is to consider whether Judge Lodge erred by failing sua sponte to recuse himself.

Defendants argue that sua sponte recusal pursuant to section 455(b)(5)(i) was not warranted by the fact that Judge Lodge's relatives were employed by the bank. It is not necessary to examine the precise contours of section 455(b)(5)(i), however, because section 455(a) provides that the mere *appearance* of partiality requires recusal. "The standard for judging the appearance of partiality requiring recusal under 28 U.S.C. § 455 is an objective one and involves ascertaining whether a reasonable person with knowledge of all the facts would conclude that the

judge's impartiality might reasonably be questioned." *Preston v. United States*, 923 F.2d 731, 734 (9th Cir. 1991) (internal quotation omitted) . Judge Lodge acknowledged at the February conference that his relatives were employed by defendants. The information relevant to determining whether recusal was required was either within the judge's knowledge at that time or within easy reach. Therefore, I disagree that Judge Lodge was not aware of obvious grounds until after the written motion was filed. I would reverse all of Judge Lodge's rulings and remand for further proceedings before a different judge.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN L. SHELSTAD; CHARLES E. MINSHEW; KEITH A. WATSON, Plaintiffs-Appellants, v. WEST ONE BANK, fka THE IDAHO FIRST NATIONAL BANK, a national banking association; WEST ONE BANCORP, fka Moore Financial Group, Inc., et al., Defendants-Appellees.	No. 94-35275 D.C. No CV-89-01248-EJL ORDER (Filed Nov. 7, 1995)

Before: WRIGHT, SKOPIL and THOMPSON, Circuit Judges.

The panel as constituted above has voted to deny the renewed petition for rehearing. Judge Thompson has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED**.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JOHN J. SHELSTAD, CHARLES E. MINSHEW and KEITH A. WATSON,

Plaintiff,

vs.

WEST ONE BANK (IDAHO) fka THE IDAHO FIRST NATIONAL BANK, a national banking association; WEST ONE BANCORP fka MOORE FINANCIAL GROUP, INC., an Idaho corporation; JAMES STEWART; THOMAS F. RIPKE; HARRY BETTIS; V. DALE BLICKENSTAFF; J. GORDON BROOKOVER; WILLIAM S. CAMPBELL; THOMAS C. FRYE; JANET S. HAY; KENLON P. JOHNSON; JAMES S. KINNEY; JACK B. LITTLE; DANIEL R. NELSON; ALLEN T. NOBLE; PHILIP B. SOULEN; DOUGLAS H. RAE; NORMAN J. SCHOONOVER; RICHARD A. SYMMS; WILLIAM J. DEASY; FRED C. HUMPHREYS; ROBERT J. LANE; EDWARD A. CONFORTI,

Defendants.

Case No. CV 89-1248

ORDER ADOPTING REPORT AND RECOMMENDATION

(Filed Nov. 2, 1993)

On June 18, 1993, United States Magistrate Judge Mikel H. Williams filed a Report and Recommendation

("Report and Recommendation") in the above-entitled proceeding and recommended that defendant West One Bank's ("bank") Motion to Dismiss be granted with respect to all of plaintiffs' remaining claims and that the Complaint be dismissed.

On June 28, 1993, plaintiffs filed Objections to the Magistrate's Report and Recommendation and, therefore, pursuant to 28 U.S.C. § 636(b)(1), this court has engaged in a de novo review of the record. It should be noted that the bank did not file any objections to the Report and Recommendation, but did file a Memorandum in Opposition to Plaintiffs' Objections on July 15, 1993. Finally, on August 4, 1993, plaintiffs requested oral argument on their objections to the Report and Recommendation.

BACKGROUND

In this suit, plaintiffs are former shareholders of a company called Crew Concepts, In. ("CCI"). As former officers and owners of CCI, the plaintiffs executed personal guarantees ("personal guarantees") in favor of the bank relating to certain loans made by the bank to CCI. The Complaint filed by plaintiffs seeks $10 million in compensatory damages and treble or punitive damages as appropriate, based on the following specific causes of action:

Count I – Contract action for breach of the 1986 Loan Agreement and Personal Guarantees.

Count II – Contract action for breach of the 1986 Loan Agreement as it relates to the purchase of the FLIR 2000A thermal imaging system.

Count III – Contract action for breach of the implied covenant of good faith and fair dealing which were part of the 1986 Loan Agreement and Personal Guarantees.

Count IV – Contract action for breach of the implied covenant of good faith and fair dealing which were part of the 1986 Loan Agreement as it related to the purchase of the FLIR 2000A thermal imaging system and personal guarantees.

Count V – Tort action for bad faith for failure to deal fairly and in good faith.

Count VI – Tort action for misrepresentation, fraud and deceit based on the loan transactions and eventual demands made by the bank.

Count VII – Tort action based on an affirmative claim of duress in refusing to provide further financing, requiring additional capital and forcing the sale of business.

Count VIII – Civil violations by the bank of Racketeer Influenced and Corrupt Organization Act ("RICO").

Count IX – Claim for punitive damages as a separate and independent cause of action.

On September 2, 1992, this court entered an order ("September 2, 1992, Order") granting the bank's Motion to Dismiss Counts I, II, III, and IV "to the extent plaintiffs seek recovery on the personal guarantees," and Counts V and VII for failure to state a claim upon which relief can be granted. This court also ordered that the individual defendants be dismissed from Counts I, II, III, and IV.

DISCUSSION

The plaintiffs' objections to the Report and Recommendation essentially restates their arguments made in Plaintiffs' opposition to Defendant's Motion to Dismiss filed on February 9, 1993. Plaintiffs also claim that facts in the Report and Recommendation are incomplete and inaccurate. Finally, plaintiffs continue their objections to this court's dismissal of claims in the September 2, 1992, Order.

Having reviewed the record herein, this court fails to agree with the plaintiffs that the facts applied by the magistrate were either incomplete or inaccurate. Second, the plaintiffs' status as former owners of CCI and guarantors of the CCI loans is insufficient to establish standing in the claims in which CCI was the party to the disputed contract. CCI is not a party in this action, so the plaintiffs cannot use CCI as the source of their standing. Since the personal guarantees were never enforced by the bank, the plaintiffs' status as guarantors cannot be held to establish standing for the allegations involving the bank's performance under the loans with CCI. This court agrees with the legal analysis of the magistrate as it relates to: 1) the lack of standing of the individual plaintiffs on the contract and tort actions as well as the RICO and fraud claims; 2) the failure of the individual plaintiffs to satisfy the real party in interest requirement of Rule 17 (a) of the Federal Rules of Civil Procedure; and 3) the determination that the plaintiffs' claim for punitive damages is a remedy and not a claim for which the individual plaintiffs have legally protected interests. Third, plaintiffs' objections to the September 2, 1992, Order are acknowledged, but this court is unable to determine a basis to

justify reconsideration of the existing order since no new evidence or law has been presented for the court to consider. Therefore, plaintiffs' objections are overruled.

Plaintiffs requested an oral argument on their objections. The plaintiffs are "not entitled to a de novo hearing but only a de novo review by the district court of those parts of the magistrate's recommendation to which objection was made." *United States v. Gaddy*, 894 F.2d 1307, 1315 (11th Cir. 1990). This court finds the written objections and memorandum filed by the plaintiffs to be sufficient to resolve the issues and denies the plaintiffs' request for a hearing on their objections.

CONCLUSION

Based on an independent review of the entire record in this matter, the court finds that plaintiffs' objections are not well taken. On the contrary, the magistrate judge's recommendation is well reasoned and well supported in the law. In light of the facts presented in this case and the substantive law applicable thereto, this court finds that the magistrate properly concluded the remaining Counts I, II, III, IV, VI, VIII and IX should be dismissed as to all defendants and the Complaint should also be dismissed since no Counts remain. The court hereby accepts in its entirety, and adopts as its own, the Report and Recommendation of Judge Williams. Plaintiffs' request for an oral hearing is denied.

ORDER

Based upon the foregoing, and the court being fully advised in the premises,

IT IS HEREBY ORDERED that:

(1) Plaintiffs' objections to the Report and Recommendation are **OVERRULED;**

(2) the Report and Recommendation filed on June 18, 1993, should be, and is hereby, incorporated by reference and **ADOPTED** in its entirety;

(3) plaintiff's request for an oral hearing is **DENIED;**

(4) the defendant bank's Motion to Dismiss should be, and is hereby, **GRANTED,** to dismiss all defendants from Counts I, II, III, IV, VI, VIII and IX; and

(5) this case is **DISMISSED** in its entirety.

Dated this 2nd day of November, 1993.

/s/ Edward J. Lodge
EDWARD J. LODGE
UNITED STATES
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JOHN H. SHELSTAD, CHARLES E. MINSHEW and KEITH A. WATSON, Plaintiffs, vs. WEST ONE BANK (IDAHO), et. al., Defendants.	Case No. CV89-1248 REPORT AND RECOMMENDATION (Filed June 18, 1993)

This matter is before the Court pursuant to an Order of Reference entered by Judge Lodge which refers all pretrial matters to this Court. Currently before the Court is Defendants' Motion to Dismiss and for Costs and Attorney Fees (Dkt. #71).

Defendants bring this motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and seek an order dismissing Counts I, II, III, IV, VIII and IX as to all Defendants. Defendants also move for an award of their costs and attorney fees reasonably and necessarily incurred in defending this action pursuant to Rule 54 of the Federal Rules of Civil Procedure, Idaho Code § 12-120, or as otherwise provided by law.

REPORT

Background

On August 17, 1989, in the District Court of the Fourth Judicial District of the State of Idaho, Ada County,

Plaintiffs filed a complaint against West One Bank, West One Bancorp (West One Bank's parent and holding company), and twenty-one individual [sic] who are directors and officers of either West One Bank or West One Bancorp, or both.

Plaintiffs are the former shareholders of a company called Crew Concepts, Inc. (CCI). CCI was formed to operate a helicopter service company. The primary asset was to be a 1973 Bell 212 Helicopter.

On December 3, 1984, CCI entered into a loan agreement with Idaho First National Bank (IFNB), now known as West One Bank, Idaho (West One). The original amount of the loan was $657,000 and was secured by a lien against the helicopter, an account at IFNB and the personal guarantees of John J. Shelstad, Harold W. DeGrange and Keith A. Watson. The loan agreement provided that after certain interest and principal payments were made, the loan would mature on February 1, 1986, and the remaining balance would be paid. The loan agreement also provided that IFNB would provide further financing after February 1, 1986, if certain terms and conditions were met.[1]

The loan matured in February and on February 4, 1986, IFNB and CCI entered into a new loan agreement for the sum of $590,000. The terms and security were much the same as the December 1984 agreement except the personal guarantors were listed as John J. and Penny Shelstad, Keith A. Watson, and Charles E. Minshew. This loan was due to mature on August 1, 1986, and again it

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[1] *See* Exhibit A to Complaint.

was agreed that if certain conditions were met, IFNB would provide further financing.[2]

On April 7, 1986, an additional loan of $37,500 was procured from IFNB by CCI to purchase an FLIR 2000A thermal imaging system. Personal guarantees of $750,000 were requested and received from the personal guarantors.[3]

Plaintiffs allege that in late October of 1986, in spite of the fact that CCI was current on both interest and principal payments, had assets with a book value substantially in excess of its loan balances, and had demonstrated both its profitability and ability to perform its future obligations, IFNB abruptly announced its withdrawal from its financing commitment and demanded that Plaintiffs either inject $375,000 of additional capital into the business or pay off the bank by selling the company or its only helicopter. Plaintiffs allege that they were unable to raise the capital, the company was sold at a substantial loss, and IFNB was paid in full.[4]

Plaintiffs allege further that IFNB had been mismanaged and was under scrutiny by various regulators and had implemented a plan to cull out and eliminate certain "undesirable" loans from its portfolio of commercial loans. Plaintiffs allege that IFNB and its holding company's actions were part of a larger scheme to hide its precarious financial condition from the public.

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[2] *See* Exhibit B to Complaint.

[3] *See* Exhibit C to Complaint.

[4] *See* Complaint, page 2.

In the Complaint filed in this action, Plaintiffs seek $10 million in compensatory damages and treble or punitive damages as appropriate, based on the following causes of action:

Count I – Contract action for breach of 1986 Loan Agreement and Personal Guarantees.

Count II – Contract action for breach of the 1986 Loan Agreement as it relates to the purchase of the FLIR 2000A thermal imaging system.

Count III – Contract action for breach of the implied covenant of good faith and fair dealing which were part of the 1986 Loan Agreement and Personal Guarantees.

Count IV – Contract action for breach of the implied covenant of good faith and fair dealing which were part of the 1986 Loan Agreement as it related to the purchase of the FLIR 2000A thermal imaging system and Personal Guarantees.

Count V – Tort action for bad faith for failure to deal fairly and in good faith.

Count VI – Tort action for misrepresentation, fraud and deceit based on the loan transactions and eventual demands made by IFNB.

Count VII – Tort action based on an affirmative claim of duress in refusing to provide further financing, requiring additional capital and forcing the sale of the business.

Count VIII – Civil violation by IFNB of the Racketeer Influenced and Corrupt Organization Act (RICO).

Procedural History

On November 1, 1989, Defendants filed a Motion to Dismiss certain portions of Plaintiffs' causes of action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

On September 2, 1992, District Judge Edward J. Lodge entered an order granting Defendants' Motion to Dismiss Counts I, II, III, and IV "to the extent Plaintiffs seek recovery on the personal guarantees," and Counts V and VII for failure to state a claim upon which relief can be granted. Judge Lodge also ordered the individual Defendants dismissed from Counts I, II, III and IV.

Motion to Dismiss

The purpose of a Rule 12(b)(6) motion is to test the sufficiency of the claim for relief by addressing itself solely to the failure of the complaint to state a claim. When the court is testing the sufficiency of the claims for relief, the complaint should be construed in a light most favorable to the plaintiff and its allegations taken as true. *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Church of Scientology v. Flynn*, 744 F.2d 694, 696 (9th Cir. 1984). The complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Reddy v. Litton Industries, Inc.*, 912 F.2d 291, 293 (9th Cir. 1990). The issue is not whether the plaintiff will ultimately prevail or is likely to prevail, but whether the plaintiff is

entitled to offer evidence to support the claim. *Scheuer, supra.*

Discussion

1. Standing.

In his September 2, 1992, Order, District Judge Lodge dismissed the portions of Counts I, II, III and IV "to the extent Plaintiffs seek recovery on personal guarantees." Defendants now urge that since Plaintiffs' claims based on their personal guarantees have been dismissed, the remaining claims under Counts I, II, III, IV, VI and VIII should also be dismissed because Plaintiffs lack standing to bring these claims. Defendants premise these arguments on the fact that Plaintiffs in this action are individual shareholders of CCI; CCI is not named as a party plaintiff.

Plaintiffs concede that during the time the alleged misrepresentations were made, Plaintiffs were the officers, directors, directors, [sic] employees and shareholders of CCI, an Idaho corporation.[5] They also concede that CCI did not sue because it suffered no harm at the hands of the bank, and indeed prospered.[6]

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[5] *See,* Plaintiffs' Opposition to Defendants' Motion to Dismiss, pp. 3, 5-6.

[6] "After CCI was sold to a third party, the company prospered. Its revenues increased nearly four-fold in 1987, to more that $1,000,000.00, and more than tripled in 1988, to $3.4 million." Plaintiffs' Opposition to Defendants' Motion to Dismiss, p. 4.

(A) Contract and Tort Claims.

Defendants argue that Plaintiffs in this action do not have standing to bring an action against Defendants for breach of loan agreements entered into between CCI and IFNB, as alleged in Counts I, II, III and IV. The facts as alleged in the Complaint clearly set forth that the corporation, CCI, was the borrower and the entity that actually entered into the various loan agreements with IFNB. However, CCI is not a plaintiff in this case.

A number of courts have recognized that a shareholder does not have standing to assert "lender liability" claims independent of those of the corporate borrower. This application of the concept of standing in such cases is based on a long established principle of United States corporate law that a stockholder of a corporation has no personal or individual right of action against third persons for damages that result indirectly to the stockholder because of the injury to the corporation. 12 B.W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 5911 (Rev. Perm. Ed. 1984).

This principle is well recognized in Idaho law as well. A corporation is an entity separate and distinct from its individual stockholders and persons managing and controlling it. *See e.g. Idaho Potato Com. v. Washington Potato Com.*, 410 F.Supp. 171 (D.C. Idaho 1976); *Nelson v. United States*, 222 F.Supp. 712 (D.C. Idaho 1963); *Jolley v. Idaho Securities, Inc.*, 90 Idaho 373, 414 P.2d 879 (1966). A shareholder who owns all or practically all of the corporation's stock is not entitled to sue as an individual because the shareholder "cannot employ the corporate form to his advantage in the business world and then

choose to ignore its separate entity when he gets to the courthouse." 12 B.W. Fletcher, *Cyclopedia of the Law of Private Corporations*, § 5910 (1984). Shareholders of a corporation lack standing to sue for damages arising out of torts committed against the corporation. *See e.g. Pitchford v. Pepi, Inc.*, 531 F.2d 92 (3rd Cir. 1975), *cert. denied*, 426 U.S. 935 (1976); *Twohy v. First Nat'l Bank*, 758 F.2d 1185 (7th Cir. 1985); *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3rd Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Terry v. Yancey*, 344 F.2d 789 (4th Cir. 1965); *Sirinakis v. Colonial Bank*, 600 F.Supp. 946 (S.D.N.Y. 1984); *Nagle v. Commercial Credit Business Loans, Inc.*, 102 F.R.D. 27 (E.D. Pa. 1983).

The Eastern District of Pennsylvania addressed the issue of shareholder standing in *Nagle v. Commercial Credit Business Loans, Inc.*, 102 F.R.D. 27 (E.D. Pa. 1983), a case in which shareholders and bondholders of a corporate debtor brought an action against a lender alleging breach of contract for refusing to extend a financing period and claiming losses arising out of related torts. As a result of these alleged wrongs, the corporation was supposedly forced into bankruptcy and plaintiffs' interests harmed. The court held that the shareholders' claims were merely derivative of the corporation's, reasoning that the lender's duty of performance inured only to the corporation and that corporate shareholders could not assert claims for breach of that duty. Since claims for breach of contract and related torts vested solely in the corporation, the court held that only the bankruptcy trustee, the corporation's representative, had standing to assert them. *Id.* at 20-30. *See also Taggart & Taggart Seed v. First Tennessee Bank National Assoc.*, 684 F. Supp. 230 (E.D. Ark. 1988), *aff'd memorandum*, 881 F.2d 1080 (8th Cir. 1989)

(dismissed lender liability claims brought by shareholders of a corporate borrower for lack of standing; shareholder recovery would constitute a double recovery if the debtor prevailed on its own claims); *ITT Diversified Credit Corp. v. Kimmel,* 508 F.Supp. 140 (N.D. Ill. 1981) (sole shareholder of corporate debtor lacked standing to assert a cause of action arising essentially as a consequence of is [sic] shareholder status and not from any violation of a duty created by contract or otherwise owed to him individually by the lender).

Even construing the complaint in a light most favorable to Plaintiffs and taking its allegations as true, Plaintiffs lack standing to pursue CCI tort and contract claims. Therefore, they are not entitled to offer evidence to support the claims and the claims should be dismissed pursuant to Rule 12(b)(6).

(B) Fraud and RICO Claims.

Plaintiffs allege misrepresentation, fraud and deceit in Count VI and a RICO violation in Count VIII based on the same fraudulent misrepresentations alleged in Count VI. Underlying both these counts are allegations that IFNB promised it would provide future financing to CCI knowing that it did not intend to carry out that commitment. Defendants assert that Plaintiffs lack standing to bring these claims, which are actually claims of CCI, a separate corporate entity.

In *Sparling v. Hoffman Constr. Co., Inc.,* 864 F.2d 635 (9th Cir. 1988), the Ninth Circuit affirmed the district court's dismissal based on plaintiffs' lack of standing. The court found that plaintiffs' status as shareholders and

guarantors did not give them standing to assert RICO claims based on injuries to the corporation. The court also recognized that other circuits having considered the issue had concluded that the principles of standing were equally applicable to RICO claims; those circuits had been unanimous in holding that shareholders do not have standing to assert RICO claims where the harm is derivative of harm to the corporation. *Id.* at 640. In addition, the Ninth Circuit held that plaintiffs must establish an injury distinct from that of other shareholders and the corporation to have standing to bring a RICO claim. The court stated:

> The [plaintiffs] argue that their harm is not derivative, but direct. This argument has no merit. [They] must show either an injury distinct from that to other shareholders or a special duty between [the defendant] and the [plaintiffs] if they are to have standing to assert RICO claims based on injury to the corporation. *See e.g., Hikita v. Nichiro Gyogyo Kaisha, Ltd.*, 713 P.2d 1197, 1199 (Alaska 1986); *Hunter v. Knight, Vale & Gregory*, 18 Wash. App. 640, 644-45, 571 P.2d 212, 215-16 (1977) (citing 13 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 5927 (perm. ed. rev. 1970). The wrong alleged is a fraud on the corporation. Because they are the sole shareholders they cannot show an injury distinct from that to other shareholders. Nor was there a special relationship between the [plaintiffs] and [defendant] which would create the kind of duty required. Thus, the court was correct in ruling that they had no standing as shareholders to assert a RICO claim.

> Any harm to the [plaintiffs] due to their status as guarantors of the bonds given by the corporation is also derivative of the harm to the corporation. Thus, this status does not give [plaintiffs] standing. *See generally, Arctic Contractors, Inc. v. State*, 573 P.2d 1385, 1386 (Alaska 1978).

Id. 640-641.

Other circuit cases decided since *Sparling v. Hoffman* have reached the conclusion that shareholders do not have standing as individuals to bring a RICO action for diminution of the value of their stock caused by alleged RICO violations conducted against the corporation. *Willis v. Lipton*, 947 F.2d 998, 100 (1st Cir. 1991); *Sears v. Likens*, 912 F.2d 880, 892 (7th Cir. 1990); *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175, 1179 (7th Cir. 1989).

In the present case, it is clear that Plaintiffs lack standing to bring fraud and RICO claims. The harm Plaintiffs allege in their status as shareholders and guarantors is derivative to any harm that may have been suffered by CCI. Plaintiffs concede that CCI has not been harmed, and has in fact flourished. Even when read in a light most favorable to Plaintiffs, there is nothing in the Complaint, or in the entire record before the Court, to suggest that any Plaintiff suffered a loss or injury distinct from that of the other Plaintiffs, or that there was some special relationship between any individual Plaintiff and Defendant. The Court can only conclude that Plaintiffs have no standing to bring fraud and RICO claims derivative to CCI, and will recommend that Counts VI and VIII be dismissed as against all Defendants.

2. Real Party in Interest.

In addition to lack of standing Defendants submit that Plaintiffs are not the person, or entity, who should bring this action at all, since it is CCI, not these individual Plaintiffs, which holds the substantive rights sought to be enforced.

Rule 17(a) of the Federal Rules of Civil Procedure states that "[e]very action shall be prosecuted in the name of the real party in interest." In other words, the action must be brought by the person entitled under the governing substantive law to enforce the asserted right. A real party in interest defense can be raised as a Rule 12(b)(6) motion; if the plaintiff is not the person who should be bringing the lawsuit, the plaintiff has "failed to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6).

The action must be brought by a party to whom the relevant substantive law grants a cause of action. *U-Haul International, Inc. v. Jartran, Inc.*, 793 F.2d 1034 (9th Cir. 1986).

Moats Trucking Co. v. Gallatin Dairies, Inc., 753 P.2d 883 (Mont. 1988) involved an action by a trucking corporation against a dairy for breach of contract and breach of the covenant of good faith and fair dealing. At trial, the court refused to allow individual shareholders to present their claims for mental and emotional distress. On appeal, the Montana Supreme Court reasoned that the sole shareholders of a corporation were not entitled to bring an action for emotional distress on behalf of themselves arising out of an alleged breach of contract and breach of the covenant of good faith and fair dealing, which was

the center of the controversy was an oral agreement between the corporation and the defendant. The corporation was the real party in interest.

As discussed in detail in part 1 (A) and (B) of the foregoing Report, CCI is the entity entitled under the governing substantive law to enforce the rights asserted by Plaintiffs. Since CCI is the real party in interest pursuant to Rule 17(a), these individual Plaintiffs have failed to state any claim upon which relief could be granted under Rule 12(b)(6).

3. Punitive Damages As A Separate & Independent Cause of Action.

In Count IX, Plaintiffs assert a claim for punitive damages as a separate and independent cause of action. Defendants argue that allegations of punitive damages cannot support a cause of action, and that therefore, Count IX should be dismissed.

Punitive damages are a remedy, not a cause of action, and cannot be awarded absent the invasion of a legally protected interest. *Davis v. Gage*, 106 Idaho 735, 739 682 P.2d 1282 (Ct. App. 1984); *Peck v. Denison*, 92 Idaho 747, 751-52, 450 P.2d 310 (1969) (the requirement that punitive damages may only be awarded where some legally protected interest has been invaded is to prevent the assessment of punitive damages against one who may have caused damage without legal injury).

As discussed in part 1 (A) and (B) of this Report, Plaintiffs have no legally protected interests in potential

claims of CCI. Therefore, there can be no remedy and thus no punitive damages. Count IX should be dismissed.

RECOMMENDATION

Based on the foregoing, I recommend that Defendants' Motion to Dismiss be granted with respect to all of Plaintiff's remaining claims under Counts I, II, III, IV, VI, VIII and IX, and the Complaint be dismissed in its entirety.

Written objections to this report and recommendation must be filed within ten (10) days pursuant to 28 U.S.C. § 636(b)(1)(B) or that party may waive the right to raise the objections before the Ninth Circuit Court of Appeals. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *McCall v. Andrus*, 628 F.2d 1185 (9th Cir. 1980), *cert. denied* 450 U.S. 996, 101 S.Ct. 1700, 68 L.Ed.2d 197 (1981); *Britt v. Simi Valley Unified School District*, 708 F.2d 452 (9th Cir. 1983).

DATED this 18 day of June, 1993.

/s/ Mikel H. Williams
MIKEL H. WILLIAMS
UNITED STATES
MAGISTRATE JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JOHN J. SHELSTAD, CHARLES E. MINSHEW and KEITH A. WATSON,

Plaintiff,

vs.

WEST ONE BANK (IDAHO) fka THE IDAHO FIRST NATIONAL BANK, a national banking association; WEST ONE BANCORP fka MOORE FINANCIAL GROUP, INC., an Idaho corporation; JAMES STEWART; THOMAS F. RIPKE; HARRY BETTIS; V. DALE BLICKENSTAFF; J. GORDON BROOKOVER; WILLIAM S. CAMPBELL; THOMAS C. FRYE; JANET S. HAY; KENLON P. JOHNSON; JAMES S. KINNEY; JACK B. LITTLE; DANIEL R. NELSON; ALLEN T. NOBLE; PHILIP B. SOULEN; DOUGLAS H. RAE; NORMAN J. SCHOONOVER; RICHARD A. SYMMS; WILLIAM J. DEASY; FRED C. HUMPHREYS; ROBERT J. LANE; EDWARD A. CONFORTI,

Defendants.

Case No. CV 89-1248

ORDER

(Filed Sep. 2, 1992)

On August 17, 1989, in the District Court of the Fourth Judicial District of the State of Idaho, Ada County,

plaintiffs filed a complaint against West One Bank (WOB), West One Bancorp (WOBC – West One Bank's parent and holding company), and twenty-one individuals who are directors and officers of either WOB, WOBC or both. The complaint alleges a number of contract and tort claims, as well as a claim based upon 28 U.S.C. § 1961 et seq. The claims are based upon the bank's refusal to provide plaintiffs with further funds for the financing of plaintiffs, former company.

On November 1, 1989, the defendants filed a Motion to Dismiss certain portions of plaintiffs' causes of action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

On December 13, 1991, Magistrate Judge Williams issued a Report and Recommendation to this court, recommending: (1) that pursuant to stipulation of the parties, the individual defendants be dismissed from Counts I, II, III and IV; (2) dismissal of those portions of Counts I, II, III, and IV to the extent plaintiffs seek recovery for breach of the personal guarantees; and, (3) dismissal of Counts V and VII for failure to state a claim upon which relief can be granted.

Plaintiffs have filed an objection to the magistrate judge's Report and Recommendation and, therefore, this court must engage in a de novo review of the record. 28 U.S.C. § 636(b)(1).

The court, having made an independent review of the record and heard oral argument on the motion, hereby accepts in their entirety, and adopts as its own, the findings made by Magistrate Judge Williams as more fully set forth below.

Background Facts[1]

Plaintiffs are the former shareholders of a company called Crew Concepts Inc. (CCI). CCI was formed to operate a helicopter service company and the primary asset was to be a 1973 Bell 212 Helicopter. On December 3, 1984, CCI entered into a loan agreement with Idaho First National Bank (IFNB), now known as West One Bank, to secure the funds to purchase the helicopter. The original amount of the loan was $657,000 and was secured by a lien against the helicopter, an account at the IFNB and the personal guarantees of John J. Shelstad, Harold W. DeGrange and Keith A. Watson. The loan agreement provided that after certain interest and principal payments were made, the loan would mature on February 1, 1986, and the remaining balance would be paid. The loan agreement also provided further financing after February 1, 1986, if certain terms and conditions were met. *See* Exhibit A to Complaint.

The loan matured in February, and on February 4, 1986, IFNB and CCI entered into a new loan agreement for the sum of $590,000. The terms and security were much the same as the December, 1984, agreement except the personal guarantors were listed as John J. and Penny Shelstad, Keith A. Watson, and Charles E. Minshew. This loan was due to mature on August 1, 1986, and it was agreed that if certain conditions were met, IFNB would provide further financing. *See* Exhibit B to Complaint.

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[1] Except as otherwise noted, the court hereby adopts the Background Facts as contained in Magistrate Judge Williams' Report and Recommendation.

On April 7, 1986, an additional loan of $37,500 was procured from IFNB by CCI to purchase an FLIR 2000A thermal imaging system and personal guarantees of $750,000 were requested and received from the personal guarantors. *See* Exhibit C to the Complaint.

Plaintiffs allege that in late October of 1986, in spite of the fact that CCI was current on both interest and principal payments, had assets with a book value substantially in excess of its loan balances, and had demonstrated both its profitability and ability to perform its future obligations, IFNB abruptly announced its withdrawal from its financing commitment and demanded that the plaintiffs[2] either inject $375,000 of additional capital into the business or pay off the bank by selling the company or its only helicopter. Plaintiffs allege that they were unable to raise the capital and the company was sold at a substantial loss and IFNB was paid in full. *See* Complaint, at p. 2.

Plaintiffs further allege that IFNB had been mismanaged and was under scrutiny by various regulators and had implemented a plan to eliminate certain "undesirable" loans from its portfolio of commercial loans. Plaintiffs allege the actions of IFNB and its holding company was part of a larger scheme to hide its precarious financial condition from the public. Plaintiffs seek $10 million in compensatory damages and treble or punitive

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[2] Plaintiffs have objected to the statement in Magistrate Judge Williams' Report and Recommendation that the demand was made on CCI. The court acknowledges this misstatement of fact and corrects the same.

damages, as appropriate, and allege the following causes of actions:

Count I: Contract action for breach of 1986 Loan Agreement and Personal Guarantees.

Count II: Contract action for breach of 1986 Loan Agreement relating to the purchase of the FLIR 2000A thermal imaging system and Personal Guarantees.

Count III: Contract action for breach of the implied covenant of good faith and fair dealing which were part of the 1986 Loan Agreement and Personal Guarantees.

Count IV: Contract action for breach of the implied covenant of good faith and fair dealing which were a part of the 1986 Loan Agreement relating to the purchase of the FLIR 2000A thermal imaging system and Personal Guarantees.

Count V: Tort action for bad faith for failure to deal fairly and in good faith.

Count VI: Tort action for misrepresentation, fraud and deceit based on the loan transactions and eventual demands made by IFNB.

Count VII: Tort action based on an affirmative claim of duress in refusing to provide further financing, requiring additional capital and forcing the sale of the business.

Count VIII: Civil violation by IFNB of the Racketeer Influenced and Corrupt Organization Act (RICO).

Motion to Dismiss

The purpose of a Rule 12(b)(6) motion is to test the sufficiency of the claim for relief by addressing itself solely to the failure of the complaint to state a claim. When the court is testing the sufficiency of the claims for relief, the complaint should be construed in a light most favorable to the plaintiff and its allegations taken as true. *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974). The complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of their claim which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957). The issue is not whether the plaintiff will ultimately prevail or is likely to prevail, but whether the claimant is entitled to offer evidence to support the claim. *Scheuer, supra.*

A. Personal Guarantees

WOB alleges that a demand was not made of plaintiffs on the guarantees and that the complaint does not allege the guarantees placed any affirmative duty on it to continue to provide financing to CCI; therefore, there was no contractual breach of the guarantees and no damage to the plaintiffs as guarantors.

Plaintiffs argue that they have an independent cause of action for breach of the guarantee agreements, even though there has been no action to collect on the guarantee. In their objection to the Report and Recommendation, plaintiffs allege that Magistrate Judge Williams' analysis of the law cited in support of their argument, was "faulty."

The court finds that as determined by Magistrate Judge Williams, the Johnston[3] case is controlling on this issue. In *Johnston*, a guarantor brought a suit against a creditor bank to whom the guarantee was given requesting a declaration of rights, release from its guarantee, and damages. As in the present case, there were no damages to the creditor bank resulting from the liability on the guarantee. The issue before the court was whether the bank, by virtue of its guarantee agreement, was responsible to the guarantor for the claimed damages, separate and apart from any obligations owed by the bank on the underlying loan agreement. The court found that the bank did not have an obligation based upon the guarantee because the alleged damages did not flow from the breach of the guaranty agreement; the damages would have occurred in the absence of any guarantee. The court explained that the injury to the guarantor either was derivative through his interest in the company who was named under the original loan agreement, or was the result of business relations with others for the company's benefit. *Id.*, at 748.

Plaintiffs in the present case assert damages based on the argument that the underlying loan agreement and guarantee are one contract, since the guarantee was a prerequisite of the loan agreement. The court notes, however, that in *Johnston*, the guaranty was also a prerequisite to the bank making the loan, but the court did not treat the contracts as one based on this fact.

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[3] *Johnston v. Oregon Bank*, 591 P.2d 746, (1979).

Plaintiffs cite *Banker's Trust of Western New York v. Steenburn*, 95 Misc. 2d 967, 409 N.Y.S. 2d 51 (1978), and *Vickers v. First Mississippi National Bank*, 458 So. 2d 1055 (1984), for the "well-settled principle that shareholders and guarantors may recover the damages which they incurred as a result of a breach of a duty owed to them as individuals." *See* Plaintiffs' Objection to the Magistrate's Report and Recommendation, at p. 9.

Contrary to the plaintiffs assertions that Magistrate Judge Williams' recommendation of dismissal relied "upon a faulty analysis of the case law cited," (*See* Plaintiffs' Objection to the Magistrate's Report and Recommendation), this court agrees with the recommendation. The cases cited by plaintiffs' do not support their argument that a breach of the loan agreement also creates simultaneous breach of the guarantee agreement; therefore, these cases are not authority on which plaintiffs' cause of action based on breach of the personal guarantee agreements may lie. Accordingly, taking the allegations in the complaint as true, the court finds that these claims should be dismissed in accordance with *Johnston*.

B. Duress

Plaintiffs allege a claim for business compulsion or duress by asserting that they were unable to obtain alternative financing on such short notice and forced to sell the company "for a fraction of its worth." *See* Plaintiffs' Objection to the Magistrate's Report and Recommendation, at p.8. Plaintiffs assert that but for the banks

demands, this was an action they would have not otherwise taken. WOB has moved the court to dismiss plaintiffs' affirmative claim of duress citing case law to support their argument that Idaho has not recognized duress as an affirmative cause of action. Plaintiffs argue that even though Idaho has not recognized duress as an affirmative cause of action, Idaho courts have not specifically ruled that it is not.

Although Idaho recognizes duress as an affirmative defense,[4] Idaho courts have not recognized duress to be an affirmative cause of action,[5] and this court will not make any presumptions as to the absence of any decisions recognizing such a cause of action.

Plaintiffs argue that since Idaho courts have not specifically precluded such a cause of action, federal courts can afford relief based thereon. However, this court finds that it would not serve judicial economy to allow this claim to stand and be presented to the jury if it is not a viable cause of action. To allow otherwise would only serve to confuse or mislead the jury and create possible errors in instructions as there is no basis in law for such a cause of action.

Order

Based on the foregoing, and being fully advised in the premises, the court hereby adopts in its entirety, but

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[4] *Newland v. Child*, 73 Idaho 530, 254 P.2d 1066 (1953).

[5] See Judge Callister's Decision in *Glenwood v. Center Ltd. Partnership v. Crown Life Ins. Co.*, Case No. 88-1067 (D. Idaho May 1, 1989).

for a noted factual error, the magistrate judge's Report and Recommendation.

IT IS HEREBY ORDERED that defendants' Motion to Dismiss Counts I, II, III and IV, to the extent plaintiffs seek recovery on the personal guarantees, is hereby **GRANTED.**

IT IS FURTHER ORDERED that defendants' Motion to Dismiss Counts V and VII for failure to state a claim upon which relief can be granted should be, and is hereby, **GRANTED.**

IT IS FURTHER ORDERED that the individual defendants be dismissed from Counts I, II, III and IV.

Dated this 2nd day of September, 1992.

/s/ Edward J. Lodge
EDWARD J. LODGE
UNITED STATES
DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN J. SHELSTAD, et al., Petitioners, vs. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, Respondent, and WEST ONE BANK (IDAHO), f/k/a The Idaho First National Bank, a national banking association, et al., Real Parties in Interest.	No. 92-70233 DC# CV-89-1248 Idaho (Boise) ORDER (Filed May 29, 1992)

Before: FARRIS, THOMPSON and FERNANDEZ, Circuit Judges

The petition for a writ of mandamus is denied. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977).

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JOHN J. SHELSTAD, CHARLES E. MINSHEW and KEITH A. WATSON, Plaintiff, vs. WEST ONE BANK (IDAHO), et al, Defendants.	Case No. CV 89-1248 ORDER (Filed Feb. 26, 1992)

Presently pending before the court is plaintiffs' Motion for Certification of Issue for Immediate Appellate Review. Plaintiffs move the court, pursuant to 28 U.S.C. § 1292 (b), to certify the following issue for the Ninth Circuit's review on interlocutory appeal:

> Whether a matter may be removed from state court to federal court when one of the two defendants, West One Bancorp, neither joins in the removal petition nor consents to removal within thirty days from the date of service upon the first defendant, and whose absence from the removal petition is unexplained.

Based on the discussion to follow, the court finds that plaintiffs have not met the jurisdictional prerequisites set forth in 28 U.S.C. §1292 (b) to enable the court to consent to an immediate appeal of this court's Order dated July 26, 1991.

FACTS

On August 17, 1989, in the District Court of the Fourth Judicial District of the State of Idaho, Ada County, plaintiffs filed a complaint against West One Bank (WOB), West One Bancorp (WOBC – West one Bank's parent and holding company), and twenty-one individuals who are directors and officers of either WOB, WOBC or both. The complaint alleges a number of contract and tort claims, as well as a claim based upon 28 U.S.C. § 1961 *et seq.* The claims are based upon the bank's refusal to provide plaintiffs with further funds for the financing of plaintiffs' former company.

Both WOB and WOBC were served with copies of the summons and complaint on August 17, 1989, at their offices on the 19th floor of the West One Plaza Building. In-house counsel for these defendants, Conrad Aikens, accepted service on behalf of both defendants. *See* Exhibit A & B to Defendants' Memorandum in Opposition to Motion to Remand.

On November 15, 1989, local counsel for WOB and WOBC filed a Petition for Removal to federal district court based on federal question jurisdiction. When the petition was filed, WOB and WOBC were the only defendants served in the action. The petition did not expressly state that it was on behalf of WOBC.

On February 26, 1991, Magistrate Williams issued an order denying plaintiffs' Motion to Remand and granting the defendants' Motion for Leave to File Amended Notice

of Removal.[1] This court subsequently adopted the magistrate's Report and Recommendation.

Although it was argued and briefed by the parties, in denying the plaintiffs' motion, Magistrate Williams did not specifically address the issue which plaintiffs herein request to be certified. However, in granting the defendants' motion to amend their removal petition, the magistrate found that the defendants should be allowed to amend their notice of removal to reflect the appropriate defendants joining in the removal. This ruling thus allowed WOBC to join in the removal petition, without finding the petition defective based on the fact that they had not previously been a party thereto.

DISCUSSION

In accordance with 28 U.S.C. §1291, courts of appeals have jurisdiction over all final decisions of the district courts. A final decision is one which "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *In Re Cement Antitrust Litigation*, 673 F.2d 1020 (9th Cir. 1982); *citing Cooper & Lybrand v. Linesay*, 437 U.S. 463 (1978).

Defendants argue that the plaintiffs' motion should be denied based in part on the ground that §1291 does not apply to the denial of a motion to remand. While it is generally true that remand orders are not considered

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[1] On May 15, 1991, Magistrate Williams issued an Order stating that the February 26, 1991, Order was to be treated as a Report and Recommendation to the District Court.

final orders reviewable by appeal, *National Audubon Society v. Department of Water*, 869 F.2d 1196 (9th Cir. 1988); *citing Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 352-53, 96 S.Ct. 584, 593-94, 46 L. Ed. 2d 542 (1976), such orders may be reviewed upon certification by the district judge under §1292 (b). Furthermore, the court notes that the plaintiffs' motion was brought under §1292 (b), not §1291.

Section 1292 (b) pertains to certification of non-final orders. It "provides a mechanism by which litigants can bring an immediate appeal of a non-final order upon the consent of both the district court and the court of appeals." *In Re Cement Antitrust Litigation, supra.*

Pursuant to 28 U.S.C. 1292 (b), the following jurisdictional prerequisites must be satisfied prior to certification by the district court of a non-final order for immediate appellate review:

> (1) The order involves a controlling question of law;
>
> (2) There's substantial ground for difference of opinion on the question of law; and
>
> (3) An immediate appeal from the order may materially advance the ultimate termination of the litigation.

Since the statute uses the conjunctive term "and," each of these requirements must be satisfied before the plaintiffs' request for certification may be granted.

Plaintiffs assert that based on the holding in *National Audubon Society, supra*, the Ninth Circuit has determined that orders to remand involve a controlling question of

law. The court finds this reasoning flawed. Although the Ninth Circuit found the order to remand in *National Audubon Society* did involve a controlling question of law, the issues involved in that case are not the same as that in the order the plaintiffs wish to certify in the present case. As plaintiffs have pointed out in their briefs, it is a particular issue contained in the order which they wish to certify on appeal. An order has to be considered on its individual facts and issues to determine whether it is a controlling question of law and appropriate for certification. *National Audubon Society* does not stand for the proposition that all orders to remand are controlling questions of law.

The legislative history of §1292 (b) indicates "it was to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *National Audubon Society, supra; citing U.S. Rubber Co. v. Wright,* 359 F.2d 784, 785 (9th Cir. 1966).

For an order to be controlling, the appellant must show that resolution of the issue could materially affect the outcome of the litigation. *U.S. Rubber Co. v. Wright, supra.* Section 1292 (b) was enacted to save time for the courts and litigants while at the same time protect against undue proliferation of appeals. *Katz v. Carte Blanche Corporation,* 496 F.2d 747 (3rd Cir. 1974).

In the present case, the court found that the defendants should be allowed to amend the removal petition to add any defendants not originally named. In so finding, WOBC was added as a petitioner. Plaintiffs now move the court to certify the issue of whether the removal based upon an alleged failure to consent by WOBC is valid.

In making its discretionary decision to allow the defendants to amend the petition for removal, the court took into consideration the undeniable presence of implied consent on the part of WOBC, the parent company of WOB, in joining in the petition. Thus, contrary to the stated issue plaintiffs request to appeal, the court found that there was consent on the part of WOBC to the removal. An interlocutory appeal of such a discretionary non-final order would appear to be plainly inconsistent with the stated policies of §1292 (b). The finding of implied consent, and decision to allow the amendment to the removal petition, is not a controlling question of law the resolution of which would materially affect the outcome of the litigation.

Since the court has found that the plaintiffs have failed to meet the controlling question of law requirement of §1292 (b), it does not need to discuss the remaining two requirements even though it appears that these requirements cannot be met either.

Based on the foregoing, and the court being fully advised in the premises,

IT IS HEREBY ORDERED that the plaintiffs' Motion for Certification of Issue for Immediate Appellate Review should be, and is hereby, **DENIED.**

Dated this 26th day of February, 1992.

/s/ Edward J. Lodge
EDWARD J. LODGE
UNITED STATES
DISTRICT JUDGE

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JOHN J. SHELSTAD, et al., Plaintiffs, vs. WEST ONE BANK (IDAHO), et al., Defendants.	Case No. 89-1248 **REPORT AND RECOMMENDATION** (Filed Dec. 13, 1991)

INTRODUCTION

The Defendants have filed a Motion to Dismiss certain portions of Plaintiffs' causes of action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The motion seeks dismissal of the individual Defendants from Counts I, II, III and IV; dismissal of Counts I, II, III and IV to the extent recovery is sought for breach of the personal guarantees made by the Plaintiffs to the Defendants; and dismissal of Counts V and VII of the complaint for failure to state a claim upon which relief can be granted. During oral argument counsel advised the Court of a case pending before the Idaho Supreme Court, *Idaho First National Bank v. Bliss Valley Foods, et al.*, No. 18230, which involved a controlling question of law concerning the Motion to Dismiss Count V of the complaint.

On June 12, 1991, the Court advised counsel that the Court would delay ruling on the motion to dismiss until

the Supreme Court had issued its opinion in the *Bliss Valley* case. The opinion was issued on September 21, 1991, and on October 15, 1991, the Defendants filed a supplemental brief in support of the Motion to Dismiss Count V. Plaintiffs have not filed any supplementary brief on the applicability of *Bliss Valley* to this case and the matter now stands submitted.

BACKGROUND

Plaintiffs are the former shareholders of a company called Crew Concepts, Inc. (CCI). CCI was formed to operate a helicopter service company and the primary asset was to be a 1973 Bell 212 Helicopter. On December 3, 1984, CCI entered into a loan agreement with Idaho First National Bank (IFNB), now known as West One, to secure the funds to purchase the helicopter. The original amount of the loan was $657,000 and was secured by a lien against the helicopter, an account at the IFNB and the personal guarantees of John J. Shelstad, Harold W. DeGrange and Keith A. Watson. The loan agreement provided that after certain interest and principal payments were made, the loan would mature on February 1, 1986, and the remaining balance would be paid. The loan agreement also provided that IFNB would provide further financing after February 1, 1986, if certain terms and conditions were met. (See Exhibit A to Complaint.)

The loan matured in February; and on February 4, 1986, IFNB and CCI entered into a new loan agreement for the sum of $590,000. The terms and security were much the same as the December 1984 agreement except the personal guarantors were listed as John J. and Penny

Shelstad, Keith A. Watson, and Charles E. Minshew. This loan was due to mature on August 1, 1986, and again it was agreed that if certain conditions were met, IFNB would provide further financing. (See Exhibit B to Complaint.)

On April 7, 1986, an additional loan of $37,500 was procured from IFNB by CCI to purchase an FLIR 2000A thermal imaging system and personal guarantees of $750,000 were requested and received from the personal guarantors. (See Exhibit C to the Complaint.)

Plaintiffs allege that in late October of 1986, in spite of the fact that CCI was current on both interest and principal payments, had assets with a book value substantially in excess of its loan balances, and had demonstrated both its profitability and ability to perform its future obligations, IFNB abruptly announced its withdrawal from its financing commitment and demanded that CCI either inject $375,000 of additional capital into the business or pay off the bank by selling the company or its only helicopter. CCI alleges that it was unable to raise the capital and the company was sold at a substantial loss and IFNB was paid in full. (Complaint, page 2.)

Plaintiffs further allege that IFNB had been mismanaged and was under scrutiny by various regulators and had implemented a plan to cull out and eliminate certain "undesirable" loans from its portfolio of commercial loans. Plaintiff alleges the actions of IFNB and its holding company was part of larger scheme to hide its precarious financial condition from the public. Plaintiffs seek $10 million in compensatory damages and treble or

punitive damages as appropriate and allege the following causes of actions:

Count I: Contract action for breach of 1986 Loan Agreement and Personal Guarantees.

Count II: Contract action for breach of 1986 Loan Agreement relating to the purchase of the FLIR 2000A thermal imaging system and Personal Guarantees.

Count III: Contract action for breach of the implied covenant of good faith and fair dealing which were a part of the 1986 Loan Agreement and Personal Guarantees.

Count IV. Contract action for breach of the implied covenant of good faith and fair dealing which were a part of the 1986 Loan Agreement relating to the purchase of the FLIR 2000A thermal imaging system and Personal Guarantees.

Count V. Tort action for bad faith for failure to deal fairly and in good faith.

Count VI. Tort action for misrepresentation, fraud and deceit based on the loan transactions and eventual demands made by IFNB.

Count VII. Tort action based on an affirmative claim of duress in refusing to provide further financing, requiring additional capital and forcing the sale of the business.

Count VIII. Civil violation by IFNB of the Racketeer Influenced and Corrupt Organization Act (RICO).

DISCUSSION

1. Motion to dismiss individual defendants from Counts I, II, III and IV.

The Defendants have moved to dismiss the individual defendants from Counts I, II, III and IV of the complaint. At oral argument the Plaintiffs concurred and stipulated that the motion could be granted.

2. Motion to dismiss those portions of Counts I, II, III and IV which are based upon breach of the personal guarantees made by the Plaintiffs to the Defendants.

In connection with the loans made by IFNB to CCI, the officers and shareholders of the corporation were required to execute personal guarantees. CCI alleges that at a certain point in time IFNB demanded that additional capital be injected into the corporation or that the helicopter or company be sold to repay the obligation. CCI was unable to raise the money and the corporation was sold.

IFNB argues that no demand was ever made under the guarantees and that the complaint does not allege that the guarantees placed any affirmative duty on IFNB to continue to provide financing to CCI. IFNB concludes by arguing that there was no contractual breach of the terms of the guarantees and no damages to the guarantors in their status as guarantors.

IFNB relies on the Oregon Supreme Court decision in *Johnston v. Oregon Bank*, 285 Or. 423, 591 P.2d 746 (1979). In *Johnston*, the plaintiff was a principal shareholder in a

lumber company who had guaranteed the lumber company's debt to the bank. The company defaulted on the loan and eventually the assets of the company were sold; however, the amount realized was insufficient to pay off the amount of the loan. Plaintiff brought an action against the bank seeking relief from his guarantee and lost investment in the lumber company. The Oregon Supreme Court held:

> It is our conclusion that the bank does not have an obligation to plaintiff based upon his guaranty to it for the kind of damages now in issue because such damages did not flow from the breach of the guaranty agreement. The damages would have occurred to plaintiff just the same in the absence of any guaranty. The damage to plaintiff resulted from plaintiff's interest in the lumber company as well as his contractual relations with other creditors and from the lumber company's bankruptcy and inability to pay its obligations, which bankruptcy was, in turn, caused by the bank's breach of its agreement with the lumber company or was the result of business relations with others for the lumber company's benefit. It was not the result of his guaranty to the bank.

Id., 591 P.2d at 748.

Plaintiffs cite two cases in support of their argument that they have an independent cause of action for breach of the guarantee agreements, even though there has been no action to collect on the guarantee. The first case, *Banker's Trust Company of Western New York v. Steenburn*, 95 Misc, 2d, 409 N.Y.S.2d 51 (1978), is not on point. That case involved an action brought by the bank to collect on

a personal guarantee executed by the borrower on behalf of his corporation. That case involved a claim for breach of contract for failure to make promised loans to the corporation. The breach of contract discussed in *Steenburn* did not arise out of the guarantee agreement, but instead from a contractual agreement to lend money that was separate from the guarantee. When the bank attempted to collect the deficiency and sued on the guarantee, the borrower properly asserted as a defense to that action that the bank had breached the contract. This [sic] not the state of the pleadings in this case. There has been no affirmative action brought by IFNB to recover on the guarantees.

The second case, *Vickers v. First Mississippi National Bank*, 458 So.2d 1055 (Miss. 1984) involved a situation where Mr. Vickers was persuaded by the bank to purchase a failing ship building business that was substantially indebted to the bank. The bank promised Mr. Vickers that it would provide him with future financing. Mr. Vickers stated that he would never have agreed to purchase the business if the bank had not agreed to lend the corporation the necessary capital to build ships. The Mississippi court held that Mr. Vickers could maintain a cause of action against the bank for breach of the contract to lend him money. The case does not stand for the proposition that Mr. Vickers also had a separate cause of action which was in some manner derived from his personal guarantee to the bank.

Plaintiffs' cited cases fall well short, in my opinion, of supporting their argument that any breach of the loan

agreements also creates simultaneous breach of the guarantee agreement. These are two separate contractual relationships and, at this point in time, no demand has been made by IFNB to enforce the guarantees and Plaintiffs have pointed to no specific portion of the guarantees that IFNB has breached. The guarantees themselves do not require IFNB to continue to finance CCI. I can find nothing in the cases cited by Plaintiffs to support their causes of action based on breach of the personal guarantee agreements. I recommend the motion to dismiss as to these portions of Counts I, II, III and IV be granted.

3. Motion to Dismiss Count V, tort of bad faith based on commercial lending relationship.

The Idaho Supreme Court decisions in *Idaho First National Bank v. Bliss Valley Foods, Inc. et al.*, 1991 WL 189467 (Idaho 1991), and *Black Canyon Racquetball Club, Inc. v. Idaho First National Bank*, 119 Idaho 171, 804 P.2d 900 (1991), are dispositive of this cause of action. Plaintiffs have not responded to the Supplemental Memorandum filed by IFNB on this issue. The Idaho Supreme Court has clearly stated the law of this jurisdiction:

> The borrowers make several arguments in support of their claim that *Black Canyon* ought not to be applied to this case and that the trial court correctly submitted the bad faith tort issue to the jury. The crux of each of the borrowers' arguments is that the circumstances surrounding the commercial loan transaction are similar to those in an insurer-insured relationship. According to the borrowers, both types of transactions usually involve performance of a public

> service, an adhesion contract, and disparity in bargaining power between the lender and borrower, all of which create a "special relationship" such as the Court found in *Unigard*. The Walkers further argue that *Black Canyon* does not apply because, since this Court ultimately held in that case that there was no valid contract between the parties, the "attempt to distinguish *White* constitutes dictum which is not binding in this case" where there is a valid contract between the parties.
>
> We have reviewed the arguments of the borrowers in support of their bad faith tort claim, and the cases cited by them, and are nevertheless convinced that our decision in *Black Canyon* was correct. The bad faith tort, which had its genesis in the peculiar nature of the first-party insurance contract, as explained in *White v. Unigard*, has no application outside the first-party insurance context, as we clearly spelled out in the *Black Canyon* case. We adhere to our decision in *Black Canyon*.

I recommend that the Court dismiss Count V of the Complaint.

4. Motion to Dismiss Count VII, affirmative cause of action based on duress.

IFNB has moved to dismiss Count VII wherein the Plaintiffs allege an affirmative claim of duress or that the actions of IFNB caused them to take action (sell the business when they could not get additional financing) that they would not have otherwise taken.

Idaho recognizes duress as an affirmative defense. *Snake River Equipment Co. v. Christensen*, 107 Idaho 541, 548-549, 691 P.2d 787 (Ct. App. 1984). Duress is most commonly raised in defense to an action commenced by one party to enforce an agreement the other party contends was not voluntarily entered into because of coercive actions of the first party. According to IFNB, there has never been a reported case in Idaho which recognizes an affirmative cause of action based on duress. The reason is that such a cause of action would almost always be subsumed within the tort claims made for fraud and misrepresentation, such as contained in Count VI of the complaint or in the claims made in Counts III and IV involving the breach of the implied contractual covenants of good faith and fair dealing. To the extent a cause of action for duress or undue influence would exist, its elements would be very similar to a tort claim of bad faith. In reviewing this matter, we cannot forget that the Idaho Supreme Court has recently held that the tort of bad faith does not exist in Idaho in a commercial lending contract.

As pointed out by Defendants, most commentators have not considered duress to be an affirmative tort.

> Duress . . . will justify recession of a contract or other transaction, with restitution, but there is no discussion of its place in the law of torts. There are odd cases which have held that duress is a tort in itself; but much more commonly it is held merely to invalidate consent given, and so permit any other tort action which would arise if there were no consent.

Prosser and Keeton On Torts, §18 at 121 (5th Ed. 1984). See *N.N. Investors Life Ins. Co. v. Professional Group, Inc.*, 468 So.2d 532, 533 (Fla. App. 1985) ("[T]he overwhelming majority of jurisdictions . . . have never recognized the tort of economic duress."). This District has also refused to recognize the tort of duress in an unpublished decision by Judge Callister. *Glenwood Center Limited Partnership v. Crown Life Insurance Company, et al.*, Civil No. 88-10678 (May 1, 1989). This also conforms to the general view of the law contained in Restatement 2d, Contracts, § 173, which states, "[s]ince duress and undue influence, unlike deceit, are *not generally of themselves actionable torts*, the victim of duress and undue influence is usually limited to avoidance and does not have an affirmative action for damages." (Emphasis added.)

I would recommend Count VII be dismissed for failure to allege a cause of action.

RECOMMENDATION

Based on the above analysis I would recommend that:

1. The individual defendants be dismissed from Counts I, II, III and IV.

2. Dismissal of those portions of Counts I, II, III and IV to the extent Plaintiffs seek recovery for breach of the personal guarantees, and

3. Dismissal of Counts V and VII for failure to state a claim upon which relief can be granted.

Written objections to this Report and Recommendation must be filed within ten (10) days pursuant to 28

U.S.C. § 636(b)(1)(B) or that party may waive the right to raise the objections in the Ninth Circuit Court of Appeals. *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 446 (1985); *McCall v. Andrus*, 628 F.2d 1185 (9th Cir. 1980), *cert. denied*, 450 U.S. 996 (1981); *Britt v. Simi Valley Unified School District*, 708 F.2d 452 (9th Cir. 1983).

DATED: December 13, 1991.

/s/ Mikel H. Williams
MIKEL H. WILLIAMS
UNITED STATES
MAGISTRATE JUDGE

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JOHN J. SHELSTAD, CHARLES E. MINSHEW and KEITH A. WATSON, Plaintiff, vs. WEST ONE BANK (IDAHO), et al., Defendants.	Case No. CV 89-1248 ORDER (Filed Jul. 26, 1991)

On February 26, 1991, United States Magistrate Mikel Williams entered an order denying the plaintiffs' Motion to Remand, and granting the defendants' Motion for Leave to File Amended Notice of Removal. Plaintiffs objected to the issuance of that order on the grounds that Local Rule 4-101(d) (Expired May 31, 1991), states that a Motion to Remand is a dispositive motion. In accordance with Local Rule 4-101(d), the magistrate entered an Order of May 15, 1991, to treat the Order of February 26, 1991, as a Report and Recommendation.

The recommendation to deny the plaintiffs' Motion to Remand was based upon Magistrate Williams' determination that this court has subject matter jurisdiction over this case, and that the procedural requirements of removal were met. The recommendation to grant the defendants' Motion for Leave to File Amended Notice of Removal was based upon Magistrate Williams' determination that the Ninth Circuit has allowed defendants to

amend their notice of removal to name the appropriate defendants, and to amend where the defect was failure to establish diversity jurisdiction.

The plaintiffs have filed an objection to the magistrate's Report and Recommendation and, therefore, this court must engage in a de novo review of the record. 28 U.S.C. §636(b)(1).

The court, having made an independent review of the record, hereby accepts in their entirety, and adopts as its own, the findings made by Magistrate Williams.

Based upon the foregoing, and the court being fully advised in the premises,

IT IS HEREBY ORDERED that the plaintiffs' Motion to Remand should be, and the same hereby is, **DENIED.**

IT IS FURTHER ORDERED that the defendants' Motion for Leave to File Amended Notice of Removal should be, and the same hereby is, **GRANTED.**

Dated this 26th day of July, 1991.

/s/ Edward J. Lodge
EDWARD J. LODGE
UNITED STATES
DISTRICT JUDGE

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JOHN J. SHELSTAD, CHARLES E. MINSHEW and KEITH A. WATSON, Plaintiffs, vs. WEST ONE BANK (IDAHO), et al., Defendants.	Case No. CV 89-1248 **ORDER** (Filed Feb. 26, 1991)

This matter is presently before the Court by Order of Reference of District Judge Lodge for disposition of Plaintiffs' Motion for Remand and Defendants' Motion for Leave to File Amended Notice of Removal. Plaintiffs John J. Shelstad, Charles E. Minshew and Keith A. Watson have requested the Court to remand this case pursuant to 28 U.S.C. § 1447(c) to the District Court of the Fourth Judicial District, Ada County, and to award them their just costs, including attorney's fees, incurred in this Motion.

BACKGROUND

Plaintiffs' complaint against West One Bank, West One Bancorp, and 21 individuals who are directors and officers of either West One Bank, West One Bancorp or both, alleges that West One Bank had agreed to renew financing for the Plaintiffs' former company provided,

among other things, that the Company's annual financial statements demonstrated adequate cash flow to service its debt payments. Plaintiffs further allege that when their company's financial statement subsequently revealed a decrease in revenues, the Bank decided not to refinance this loan. Based on the Bank's refusals to provide further funds to this floundering company, the complaint purports to state a number of contract and tort claims, as well as a claim based on RICO, 28 U.S.C. 1961 *et seq.*

Plaintiff's complaint was originally filed in the district court of the Fourth Judicial District of the State of Idaho, Ada County, on August 17, 1989. On September 15, 1989, Defendant West One Bank (Idaho), filed a Petition for Removal to federal district court based on federal question jurisdiction. The Petition for Removal did not purport to be on behalf of all Defendants.

A. PLAINTIFFS' MOTION FOR REMAND

Plaintiffs contend that the Defendants' Petition for Removal is both procedurally and substantively defective and seeks remand to state district court. The burden of establishing federal jurisdiction is upon the party seeking removal. *Wilson v. Republic Iron & Steel Co.*, 27 U.S. 92, 97 (1921).

1. Removal Jurisdiction.

Defendant West One Bank (Idaho) bases its removal on federal question jurisdiction, 28 U.S.C. § 1441. That section allows removal of an "action of which district

courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States." The original jurisdiction of the court, and consequently the validity of the removal, depends upon whether a right or immunity created by the federal law is an essential element of plaintiff's cause of action. *State of Oklahoma Ex Rel Wilson v. Blankenship*, 447 F.2d 687, 690-92 (10th Cir. 1971), *citing Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936).

The Ninth Circuit has held that federal courts have concurrent jurisdiction over RICO claims. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1194 (9th Cir. 1988), *citing Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987). I find that this Court has subject matter jurisdiction in this case.

2. Procedural Requirements of Removal.

Plaintiffs argue that the removal is procedurally defective in that Defendants failed to meet several procedural requirements of 28 U.S.C. § 1446, the primary complaint being that not all Defendants have joined or concurred in the Notice of Removal. Plaintiffs argue that the statutory provisions regarding removal must be strictly applied and that the failure of the other 20 Defendants to join in the removal is grounds for remand to state court.

The general rule is that all defendants in a state court action must join in the petition for removal. 28 U.S.C. § 1446(a); *Hewitt v. City of Stanton*, 798 F.2d 1230, 1233 (9th Cir. 1986). This general rule applies, however, only to defendants properly joined and served in the action. *Emrich*, 846 F.2d at 1193, n.1. A party not served need not

be joined in the removal action. *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1429 (9th Cir. 1984); *see also Community Bldg. Co. v. Maryland Casualty Co.*, 8 F.2d 678 (9th Cir. 1925) *cert. denied* 70 U.S. 652 (1926). In this case, at the time of notice of removal, the other 20 individual Defendants had not yet been served with summonses. It would have been improper for West One to join the other 20 Defendants in the notice of removal. Thus, the Court finds that failure to join those Defendants is not fatal to the removal.

Plaintiffs also contend that Defendants' removal is defective in that it failed to notify the state court of the removal within the 30 days required by 28 U.S.C. § 1446(b). The Petition for Removal was filed on September 15, 1989, and notice was given to the state court on October 18, 1989, 33 days later. The Court finds that, even if there was delay in providing the state court with a copy of the petition, the delay was not substantial and it does not preclude removal. *Cullen v. BMW of N America*, 84 F.R.D. 342, 343 (E.D.N.Y. 1979).

Plaintiffs contend that Defendants' removal is defective in that it should be entitled "Notice of Removal" and as a result is not signed pursuant to Rule 11 of the FEderal Rules of Civil Procedure. The Court finds that the title of the document removing the action from state to federal court is not a substantial defect.

B. DEFENDANTS' MOTION TO AMEND

In *Emrich*, 846 F.2d at 1193, n.1, the Ninth Circuit allowed defendants to amend their notice of removal to name the appropriate defendants. The Ninth Circuit has

also allowed amendment where the defect was failure to establish diversity jurisdiction. *Luehrs v. Utah Home Fire Ins. Co.*, 450 F.2d 452 (9th Cir. 1971); *London v. Standard Oil Co. of California, Inc.*, 417 F.2d 820 (9th Cir. 1969). The Court finds that Defendants should be allowed to amend their notice of removal to reflect the appropriate defendants joining in the removal and to add copies of all process, pleadings and order from the state court.

ORDER

Based upon the foregoing, the Court having reviewed the matter and being fully advised in the premises;

IT IS HEREBY ORDERED:

1. That Plaintiffs' Motion to Remand be, and hereby is, DENIED.

2. That Defendants' Motion for Leave to File Amended Notice of Removal be, and hereby is, GRANTED. Defendants shall have until March 13, 1991, to file its amended Notice of Removal.

DATED: February 26, 1991.

/s/ Mikel H. Williams
MIKEL H. WILLIAMS
UNITED STATES
MAGISTRATE JUDGE

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JOHN J. SHELSTAD, KEITH A. WATSON, and CHARLES A. MINSHEW, Plaintiffs, WEST ONE BANK (IDAHO), et al., Defendants.	)	CV 89-1248

FEBRUARY 1, 1993
BEFORE THE HONORABLE EDWARD J. LODGE
IN CHAMBERS
BOISE, IDAHO

Court Reporter:

MARGARET E. SATTERFIELD, CSR, RPR
Official Court Reporter – Boise, Idaho

APPEARANCES:

For the Plaintiffs: RANDAL J. FRENCH
Attorney at Law
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Boise, Idaho 83701-2730

For the Defendant JOHN F. KURTZ
Attorney at Law
P. O. Box 1617
Boise, Idaho 83701

PROCEEDINGS

February 1, 1993

[p. 2] THE COURT: We have the court reporter present now. For the record, I want you to state your position in as much detail as you desire.

MR. FRENCH: My name is Randy French. I represent the Plaintiffs in this case, John Shelstad, Charles Minshew, Keith Watson versus West One Bank.

MR. KURTZ: John Kurtz, representing West One Bank Corporation.

MR. CHATTIN: Phil Chattin, in-house counsel for West One Bank Corporation.

MR. FRENCH: We are here at my request and consent of the Judge to discuss some issues concerning 28 U.S.C 455 (a) and (b). I have expressed previously my concerns that relate to the appearance of partiality and impartiality as opposed to a suggestion of actual bias or prejudice which in my view would be controlled by 28 U.S.C Section 144.

My concern under 28 U.S.C. 455 was the discovery that there is a brother and a nephew of Judge Lodge's working at West One Bank. [p. 3] Subsequent to that I requested from Mr. Kurtz and counsel for the bank information concerning any other relationship which might raise questions under Section 455(a) or (b), and because it was not in the form of formal discovery – no discovery or response for information of any significance, I won't say none whatsoever, but certainly my questions were not answered. Mr. Kurtz did respond in a letter dated January 12, 1993, he acknowledged that the Judge's brother is employed as an agriculture representative. I don't see any reference to Joseph Lodge, who from my information is a nephew of the Judge who is also employed at West One Bank.

My concern is that to this point we have not had the factual development that would bear upon a question under either Section 455(a) or Section 455(b). One of the questions that I raised in my correspondence was whether any relative of Judge Lodge would be an officer of the bank. I see a specific answer that is not so. However, I'm a little skeptical, I'm concerned about what the definition of "officer" may be as used by Mr. Kurtz, and there may be an [p. 4] issue as to whether an officer in the scope of Section 455(b) is broader than Mr. Kurtz may be using it in his letter.

Beyond that, because we have not had actual discovery, we are not able to go forward and discuss any other facts which might underlie issues in Section 455. So what we are discussing today – the issue I see and what I am going to suggest is a timetable that is needed to resolve those issues properly; that is, I expect probably to file a

motion that would ask for an additional 60 days in order to conduct some discovery, and if necessary have some depositions of appropriate personnel at the branch to determine whether or not there would be any basis for concerns under Section 455.

THE COURT: Mr. Kurtz.

MR. KURTZ: Yes, Your Honor. West One did send a letter to Mr. French responding to some of the issues on January 12, 1993. We provided a copy of that letter to the Court today, in light of the fact Mr. French's motion did not include that. Our position is simple. We looked at Section 455 when Mr. French raised the issue. We have not talked to Norman, who I [p. 5] understand is your brother and an employee of West One, in any way regarding this case. As far as I know, he has nothing to do with it. I don't think that Mr. French is suggesting he is a factual witness or had any responsibility. It is my understanding that Mr. Norman Lodge is an agriculture specialist with the bank.

There was a request to take his deposition. I received a phone call three or four days before the requested deposition. I was to be out of town. Our position would be we did not see any reason for the deposition. I was not going to be available within three days' notice. That was the only real request for any discovery other than letters written.

The problem I have with this whole process at this point is really that, first of all, under 455 it seems to be that the Court makes the initial determination whether there is any basis or reason for disqualification. This case has been around a long, long time. I'm confident that the

Court did not see any basis for disqualification by stirring up this hornet's nest, going off and taking a bunch of depositions, trying to make a big deal.

[p. 6] I wonder if Plaintiffs are the ones giving the appearance of some type of impropriety? That is the reason the bank took the position it was not going to participate. We did respond specifically to 455. I'm confident that any discovery will clearly show there are no bases for disqualification of the Court under 455. It is a witch hunt we don't want to participate in this late in the case.

This case has been around a long time. Judge Williams, then you, Judge, have ruled on motions pending previously on a number of different motions in this case. We now have motions pending we think are dispositive of the remainder of the case, and to have to reeducate a different judge at this late stage in the case is blatantly unfair to West One and to all parties.

If the Court thinks we need to provide some additional information, we will if it helps you make your decision, but we are confident there is no one that we are aware of that is your relative that has anything to do with any aspect of this case.

MR. FRENCH: I would suggest that certainly we are at a late date in the case. [p. 7] This case has been pending for a long time. I agree that at least in the first instance it is the Judge's responsibility to make a determination, and frequently if there is any issue it jumps right out, it catches your attention. But there are instances and circumstances here the facts are number one; not known to the Plaintiffs that are known to the Defendant

because it was his employees. Those don't necessarily – don't just necessarily just jump out.

There was in '86 or '88 a United States Supreme Court decision concerning disqualification under this section in which the United States Supreme Court noted it made no difference. It was not until after the litigation was entirely completed before the fact which gave rise to disqualification under Section 455 actually came forward all at the same time and same place, so the Judge could say, "That is right, I do have this kind of relationship."

So the fact we are at this late date does nothing to say, "No, it is too late, there can be no waiver of any rights under 455. We did [p. 8] not discover until November or December of last year – it was at the beginning of the inquiry – the fact there were relatives of yours, Judge, who worked at West One, and to hold otherwise would simply encourage a party who knows of some facts that may not come to the Judge's attention. All they have to do is wait until they get far enough along in a case and it would be unfair for us to raise these issues.

Because of the time of the discovery of these facts, we don't think the age of the case can be a factor. We think that the fact there are these relationships and how they might appear to objective third parties may never have arisen in your mind, Judge, or anybody else's mind until everything came together. Also, it cannot affect the plaintiffs' right to the protection that they are provided by Section 455.

So we don't believe that either of those factors can be a determination, and certainly it cannot be a factor bearing on this decision that by actually making the inquiry

and determining what the facts are that the Plaintiffs are creating a scene or basis upon which to allege there is some impartiality. That [p. 9] simply can't be or Section 455 can't work. If the party raises it that simply cannot work.

The Court should, after an appropriate factual basis, determine whether the relationship – not the fact the issue was raised, but the relationship – how an objective third party would view those relationships to protect the integrity of the judicial system. This section is designed to provide confidence in the system by removing the appearance of partiality, that the litigants are provided with what they are entitled to, to have a decision where there is no appearance whatsoever of impartiality.

We don't see there is any justification given not to have appropriate discovery. The fact that the bank feels there is no problem here, we should not have to be in the dark and try to make a case on this. We should be entitled to determine what all the relationships are and present them to the Court this afternoon and allow the Court to make a decision on what a objective third party would believe if that third party knows all of the facts that we are asking to be entitled to do.

[p. 10] MR. KURTZ: If I could make a couple of comments, we are opposed to any discovery. We don't think it is appropriate under 455 . If you feel there is more discovery necessary we feel it would be limited to interrogatories directed at 455, so we don't get into this. Who knows how long a deposition can last? We have not spoken to anyone I'm aware of in your family on this case.

There is no reason to do that. Perhaps they can direct an interrogatory toward that, you can narrow it down to a written interrogatory, then maybe they could be reviewed by the Court as opposed to being filed in the record. We would certainly provide wherever appropriate for West One to attest, to swear to the interrogatory answer.

THE COURT: I am glad you both came up here and stated your position. It puts the Court in an awkward situation because I am very sensitive to these issues and always have been. I have familiarized myself with these particular sections and you read the sections. For the record there is no disqualification; 455 addresses itself to impartiality that might [p. 11] reasonably be questioned and goes into an explanation of what it means by fiduciary, what the relationship should be. In my judgement when they are talking about this type of thing they are specifically talking about an officer, director or trustee.

I am sure if you would ask my brother he would love to be one of those, but he is not even close. He is an agriculture representative, and I have no idea what his salary would be, but I know that at times he is not even working for West One on an eight to five schedule.

As far as Joe is concerned, I do not know what Joe is, I have never visited with him. I am confident he is not an officer, director or trustee. I have no qualms with discovery, if it is limited to what their relationship is to the bank. I think it could be handled easily by admissions or interrogatories.

I do not care whether I am in the case or out of the case, I have more cases to handle than I can handle. My

problem is I have been handling cases clear back into bankruptcy with West One.

I don't have any bank account with [p. 12] West One, I don't have any stock in West One. I do not bank with West One, I feel comfortable in my conscience. The problem is when you bring these things up and make an issue of them and I then make an adverse ruling against your people, it puts me in an awkward position. But I am not about to disqualify myself in this case because I have handled cases involving West One and I am confident I have ruled for them as well as against them. So if I would step down, it would not look very good. If I bowed out, then I think maybe people in the past would feel they were treated unfairly.

In my judgment there is absolutely no disqualification under the code. In addition, the only other District Judge in the State of Idaho is disqualified because of some relationship he has, which puts some greater burden on this Judge to handle these cases.

I am in an awkward position because I am so sensitive to these situations. I had to sell some stock in another corporation just because of the possibility I might have to make a decision either for or against that corporation. I think your concern even addressed my brother's [p. 13] present wife. I have no idea what her capacity was with the bank, I just met her last year. So far as I know, she is not working there any more.

I do not know that I have answered your question, but I am in a position where I cannot come forward and be a nice guy and say I am getting out of the case,

because I have ruled since bankruptcy on issues concerning West One as well as all other financial institutions in the Valley. I have no idea how many times I ruled for or against them.

If you could point out something specifically other than the fact my brother and nephew work there as employees that I might have overlooked, then I would have a basis for stepping down.

MR. FRENCH: One of the concerns I have is that Section 455(b)(5)(i) does say "officer of the corporation." It does not limit it in any way. I don't have extensive background with banks, but it is a general feeling of mine that essentially every loan officer is an officer of the bank. There is a wide number, a large number in every bank that are given power to execute documents on behalf of the bank or [p. 14] formally represent beyond tellers and support people who it is my understanding qualify as officers. What I do not know at this point is what definition has been used with Mr. Kurtz as he responded to my question. If the section limited it to executive officer, then it would be a much narrower definition, and then it would be a lot easier to make a determination on that. But it is not limited to executive officer. It is possible that is an officer.

THE COURT: Who are you suggesting might be an officer?

MR. FRENCH: Either Joe or Norman might be, I know that Norman might not be called a vice-president or anything, but whether he has been made an individual who is able to sign documents on behalf of the bank or

otherwise in their use of the word is considered an officer. I don't know about Norman; I have been told that Joe is a commercial loan officer. To me that puts him in the realm of an officer. That is something I would need to do some discovery on in order to be able to present the facts.

If the Court would like, I can submit a formal motion to extend the time so we can have [p. 15] time to do this discovery, then let this Court rule based on the facts that are presented. He would have to answer and it would be under oath. I am absolutely confident what Joe might be is a commercial loan officer.

MR. CHATTIN: Norman is not a loan officer and is not an officer of the corporation, either, at the bank holding level. A bank president and above is considered an officer.

MR. KURTZ: The relevant definition is code sections. The typical corporate officers, which clearly he does not fall in the scope of that unless Mr. French has some authority, a loan officer would be an officer as defined in that section.

THE COURT: It would have to be somebody in a position to effect company policy. I would even like to know myself if there is an outside chance this is the type of person they are talking about.

MR. CHATTIN: I don't think either one can make policy. Joe might be able to bind us to a loan agreement, but make policy for the company, a commercial loan officer, I don't think so.

[p. 16] MR. KURTZ: Is Joe Norman's son?

THE COURT: Yes.

MR. KURTZ: Do nephews fall in the scope of that –

THE COURT: I certainly have not been hearing these matters because I was trying to favor one side or the other. I have been involved in litigation clear back into bankruptcy court.

MR. FRENCH: I need the opportunity to gather the facts so that I can make my case or not make my case. If I think that the case law does not support the position –

MR. KURTZ: As long as we are here informally, I want to again raise the issue of if he is going to go forward and file a motion to disqualify or conduct some discovery. We have an order that is in place today that gave the Plaintiffs until today to respond to our motion to dismiss. His brief is due. I'm not sure if he is asking for an extension of that or not. We need to address that. It seems to me that depositions again will expand this well beyond the scope of what it needs to be. If we could get some guidance from the Court, perhaps [p. 17] limiting interrogatories to issues in 455.

If we have no guidance, it'll be our position to come in on past the discovery. That is not very good use of West One or Plaintiffs' or the Court's time. If we can work this out in advance how the Court thinks we should proceed, we feel general interrogatories directed to the respective issues under 455 would be the appropriate way to proceed.

MR. FRENCH: Your Honor, what I would like – certainly I expect and appreciate the opportunity to present interrogatories – I would like with the agreement of confidentiality concerning everything in there, to be able to inspect the personnel files, see what documents the ban': has – what position these people have. I understand they are going to answer under oath as best they can, but by the same token, they are able to skillfully craft answers to interrogatories which may not provide me with all of the information I need.

I don't know for a fact depositions will be appropriate, but I would not want to foreclose them. I can't imagine they would be extensive if depositions were held. The right to [p. 18] ask questions of the respective individuals involved is something I think would be central to the discovery process. It may be based on what we find in the personnel files and answers to interrogatories would be such that we would not need any depositions. I can't commit to that at this point; I don't feel it would be appropriate to place that kind of limitation on us. If the Court prefers, before any deposition we can get together one more time and talk about what has happened so far as what specifically we would be looking for in a deposition, but I don't think it would be appropriate to foreclose depositions at this time.

Also, we are looking to extend the time to respond to the motion to dismiss in light of these issues.

MR. KURTZ: Motion to dismiss, one extension has been granted. We would like to move the case along.

THE COURT: I think in fairness you probably ought – I am not going to rule on it until I am confident I

have covered the concerns here. Personally, I feel very comfortable having you look at their personnel files if you can get [p. 19] permission from them or the bank –

MR. KURTZ: I don't know what law is out there on disclosures of employee records. We have taken the position we will not disclose customer records without getting a court order. I can't imagine we would disclose employee records. We are not going to mislead the Court. We will define what their responsibilities are. However, he is using that as a mechanism to double-check, and I'm a little offended by it. However, the bank's position is not to disclose those without court orders unless we see some other basis for disclosing confidential in formation.

THE COURT: I want to be sure I am not in a position of suggesting any type of impartiality or partiality. That is why I am more than willing –

MR. KURTZ: I understand, but we have responsibilities of confidentiality, and I would –

THE COURT: I would assume you could ask your questions and see whether you are satisfied or not, then a telephone conference if you find out it needs a court order to go forward [p. 20] with that. I want to be sure I am on solid ground. I can tell you that I am absolutely comfortable. I would not have been in these cases if I felt there was any potential violation of these rules. I may be reading them closer than what was intended, but I would think it would be a person in a position to have some ability to influence or affect management of the corporation. Is there a mandatory retirement from West One?

MR. CHATTIN: I don't think there is.

THE COURT: Well, anyway, personally I do not feel I have any bias or prejudice either in favor of or against West One. I know when I have been to Ninth Circuit conferences, if you own any stock, even one share of stock, you are to get out of it. I have done that if I was ruling on a case. I think this is going too far when you are dealing in a little area like we are. You do not have that many judges to pass these things around. If I did – I want to make clear if I owned 100 shares of stock in West One, there would be no hesitation with me disqualifying myself. As far as ownership, if I was reading that correctly it states officer, [p. 21] director or trustee. That would be somebody in a position that would have ability to influence or affect a decision. I do not want to feel I have to get out because somebody does not like my ruling. That puts me in an awkward position.

MR. FRENCH: You said you would allow us a short extension to get our response to the motion to dismiss filed. If we could have 15 days, I would have it here in maybe less than that.

THE COURT: Fifteen days. In the meantime, I would like you to pursue this other situation if you have a chance to brief whether the officer – they are talking about any officer clear down the line or not. I would like you to know that until this point right now I did not know his position, I knew he was in a program where you come along through the bank apprenticeship program, but I did not know where he was.

MR. KURTZ: I didn't know he was there either.

THE COURT: I did not either, but if he is to make any advancement in the bank I would assume they have to go through some kind of [p. 22] management program. I do not even know what branch office he is in.

(Whereupon, said conference was concluded.)

REPORTER'S CERTIFICATION

I, MARGARET E. SATTERFIELD, certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

/s/ Margaret E. Satterfield 5-18-94
MARGARET E. SATTERFIELD DATE

FILED
MAR 18 1996
CLERK

No. 95-1255

In The

Supreme Court of the United States

October Term, 1995

JOHN J. SHELSTAD, CHARLES E. MINSHEW and KEITH A. WATSON,

Petitioners,

vs.

WEST ONE BANK (IDAHO) fka THE IDAHO FIRST NATIONAL BANK, a national banking association, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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40 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause and this Court's holding in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 were violated by the Ninth Circuit's decision to deny Petitioners' motion to vacate all of the rulings of the District Judge entered prior to Petitioners' motion for disqualification, all of which were reviewed by the Ninth Circuit on a *de novo* basis, when Petitioners delayed filing that motion for more than eight months after ascertaining all of the grounds supporting the motion for disqualification and after the claims had been dismissed, because the District Judge should have recused himself based upon the appearance of impropriety under 28 U.S.C. § 455(a)?

2. Whether the District Court was required by 28 U.S.C. § 1447(c) to remand a case to state court when the notice of removal had been filed within thirty days of the filing of the case by the lawyers representing both of the two served defendants where only one of those defendants was expressly mentioned in the notice of removal but where the defendant named in the notice of removal was a wholly owned subsidiary of the other served defendant and both defendants consented to the removal and the court permitted the filing of an amendment to the notice of removal in which all of the defendants joined?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceedings in the United States Court of Appeals for the Ninth Circuit, the Amended Memorandum of which is here for review, were:

1. Petitioners John J. Shelstad, Charles E. Minshew, and Keith A. Watson, Appellants in the Court of Appeals; and

2. Respondents West One Bank (Idaho) fka the Idaho First National Bank; West One Bancorp fka Moore Financial Group, Inc.; U.S. Bancorp, as successor by merger to West One Bancorp as of December 26, 1995; James Stewart; Thomas F. Ripke; Harry Bettis; V. Dale Blickenstaff; J. Gordon Brookover; William S. Campbell; Thomas C. Frye; Janet S. Hay; Kenlon P. Johnson; James S. Kinney; Jack B. Little; Daniel R. Nelson; Allen T. Noble; Philip B. Soulen; Douglas H. Rae; Norman J. Schoonover; Richard A. Symms; William J. Deasy; Fred C. Humphreys; Robert J. Lane; and Edward A. Conforti, Appellees in the Court of Appeals.

Pursuant to Rule 29.6 of the Supreme Court Rules, Respondent West One Bank, Idaho states that its corporate parent is Respondent West One Bancorp, an Idaho corporation which merged with U.S. Bancorp on December 26, 1995, its subsidiaries are wholly owned, and that it has no affiliates that have issued shares to the public.

Respondent West One Bancorp is the corporate parent to Respondent West One Bank, Idaho and issues shares of stock to the general public.

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APPENDIX

Appendix A — Order Denying Petition For Rehearing Of The United States Court Of Appeals For The Ninth Circuit Filed October 19, 1995 ..... 1a

The Respondents, West One Bank (Idaho) fka The Idaho First National Bank, a national banking association, *et al.*, respectfully request that this Court deny the Petition For A Writ Of Certiorari, seeking review of the Ninth Circuit's opinion in this case. The Ninth Circuit's Amended Memorandum filed on September 27, 1995 was ordered not appropriate for publication and may not be cited to or by the courts of the Circuit except as provided by Ninth Circuit Rule 36-3.

OPINIONS BELOW

The Panel's Amended Memorandum and Memorandum were "Not for Publication" and appear as Appendixes A and B to the Petition (P. App. 1 and 11). The Order denying the Petition for Rehearing and the rehearing *en banc* was "Not for Publication" and appears in Appendix A to this Brief (App. 1a-2a). The Order denying the Renewed Petition for Rehearing and for Rehearing *en banc* was "Not for Publication" and appears in the Petition as Appendix C (P. App. 20). The decisions of the District Court and of the magistrate are not reported and appear in the Petition as Appendixes D, E, and F (P. App. 21, 27 and 41). Attached as Appendix L to the Petition is the transcript of the in-chambers conference with the District Court on February 1, 1993 (P. App. 77).

STATEMENT OF JURISDICTION

The petition for writ of certiorari is not timely. Title 28 U.S.C. § 2101 requires a petition for certiorari in a civil case to be filed within 90 days of the entry of judgment below. *Missouri v. Jenkins*, 495 U.S. 33, 46 (1990). *See also* Supreme Court Rules 13.1 and 13.4. The 90 day limit is mandatory and jurisdictional. *Id.*

The Ninth Circuit entered its original Memorandum on June

28, 1995. On July 11, 1995, Petitioners filed a Petition for Rehearing with Suggestion for Rehearing *en banc*. On September 27, 1995, the Ninth Circuit panel filed an Amended Memorandum. On October 10, 1995, prior to any ruling on their July 11, 1995, petition for rehearing, Petitioners filed a Renewed Petition for Rehearing with Suggestion for Rehearing *en banc*. On October 19, 1995, the Ninth Circuit entered its Order denying Petitioners' July 11, 1995 Petition for Rehearing and Suggestion for Rehearing *en banc* (App. 1a). On November 7, 1995, the Court of Appeals entered its Order denying Petitioners' Renewed Petition for Rehearing filed on October 10, 1995.

A petition for rehearing tolls the running of the 90 day period for seeking certiorari. *Missouri v. Jenkins*, 495 U.S. at 46. The tolling practice rests upon the fact that petitions for rehearing are authorized by Rule 40(a) of the Federal Rules of Appellate Procedure, and the circuit courts are required to entertain such a petition. 495 U.S. at 46 n.14. However, neither the applicable statute nor the Federal Rules of Appellate Procedure authorize a second or successive petition for rehearing. *National Latex Prod. Co. v. Sun Rubber Co.*, 276 F.2d 167, 168 (6th Cir. 1960). Accordingly, the time for filing a petition for a writ of certiorari begins to run from the date of denial of the petition for rehearing, and further suspension cannot be obtained by filing a second petition for rehearing. *Gypsy Oil Co. v. Escoe*, 275 U.S. 498, 499 (1927); *Morse v. United States*, 270 U.S. 151, 153 (1926).

In this case, Petitioners' original petition for rehearing was denied on October 19, 1995 (App. 1a). Although they filed a second petition for rehearing, the Petitioners were not granted leave to file that petition and that petition was not granted. Therefore, the 90 day period within which to seek certiorari began to run on October 19, 1995. The petition for writ of certiorari was filed on February 5, 1996, more than 90 days after October 19, 1995.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment

> No person shall . . . be deprived of life, liberty or property without due process of law.

28 U.S.C. § 455(a)

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(b)(5)(i)

> He shall also disqualify himself in the following circumstances:
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:
>
> (i) is a party to the proceedings, or an officer, director, or trustee of a party.

28 U.S.C. § 455(c)

> A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

28 U.S.C. § 455(e)

> No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 1446

> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a state court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (b) The notice of removal of a civil action or proceedings shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has been filed in court

and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1447(c)

A motion to remand a case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. § 1653

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Fed. R. Civ. P. 60(b)(6)

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

(6) Any other reason justifying relief from the operation of the judgment. The motion shall be made within a

> reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. . . .

STATEMENT OF THE CASE

A. Allegations in Complaint

Petitioners John J. Shelstad, Charles E. Minshew and Keith A. Watson are former shareholders of a corporation named Crew Concepts, Inc. ("Crew Concepts"). The claims in this case involve two loans made to Crew Concepts by Respondent West One Bank, Idaho ("Bank"). As former officers and owners of Crew Concepts, the Petitioners executed personal guarantees of the loans to Crew Concepts.

The Petitioners alleged that the Bank withdrew a financing commitment to Crew Concepts. When Crew Concepts was unable to raise capital the Petitioners sold their stock in that corporation. The loans were fully repaid to the Bank and no amount was ever collected against the personal guarantees. Crew Concepts was never a party in this case.

The complaint filed by the Petitioners sought compensatory, treble and punitive damages based on claims of (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) bad faith tort, (4) misrepresentation, fraud and deceit, (5) duress, and (6) violations of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1341, 1343, 1961, *et seq.*

B. Course of Proceedings

The Petitioners filed their complaint in Idaho state court on

August 17, 1989. On September 15, 1989, the Bank filed a Petition for Removal pursuant to 28 U.S.C. § 1441. Petitioners filed a motion to remand the case on September 16, 1989. On February 26, 1991, the United States Magistrate Judge, Mikel H. Williams, entered an Order denying Petitioners' motion for remand and granting Respondents' motion for leave to file an amended notice of removal. P. App. K, pp. 72-76. On July 26, 1991, United States District Judge Edward J. Lodge entered an Order adopting the decision of Magistrate Judge Williams, denying the motion for remand and granting the Respondents leave to file an amended notice of removal. P. App. J., pp. 70-71.[1]

On December 13, 1991 Magistrate Judge Williams filed a Report and Recommendation, granting Respondents' motion requesting dismissal of certain portions of Petitioners' claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. P. App. I, pp. 58-69. On September 2, 1992 the District Court entered an Order adopting the Magistrate's Report and Recommendation. P. App. F., pp. 41-50.

By no later than November of 1992 Petitioners became aware that Judge Lodge's brother and nephew were employed by the Bank. They were also aware that Judge Lodge's sister-in-law had previously been an employee of the Bank. Supp. R. 52-57.

On February 1, 1993, a conference was held in chambers with Judge Lodge. Petitioners notified Judge Lodge that his brother and nephew were employees of the Bank. Judge Lodge acknowledged that his brother was an agricultural representative for the Bank and that his nephew was a loan officer. Further, Judge Lodge indicated that his sister-in-law, Sandra Lodge,

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1. A Magistrate Judge has jurisdiction to decide a motion to remand and a motion to amend. 28 U.S.C. § 636(b)(1)(A). Therefore, it was not actually necessary for District Judge Lodge to review Judge Williams' Order.

whom he had just recently met, may have worked for the Bank, but that he did not know the nature of her position or whether she was still employed by the Bank. P. App. L, pp. 77-92.

Contrary to the suggestion in their brief, Petitioners did not request Judge Lodge to recuse himself at that conference. The purpose of the meeting in chambers that day according to Petitioners' attorney was to obtain a ruling allowing discovery on the recusal issue by taking the depositions of Judge Lodge's relatives. P. App. L, pp. 77-92. Petitioners' attorney stated at the conference in relevant part:

> My concern is that to this point we have not had the factual development that would bear upon a question under either section 455(a) or section 455(b).

P. App. L, p. 79. Petitioners' attorney stated that they were requesting depositions of Judge Lodge's relatives to "determine whether or not there would be any basis for concerns under section 455" (P. App. L, p. 80) and that he needed "the opportunity to gather facts that I can make my case or not make my case." P. App. L, p. 88.

In their brief, Petitioners have taken Judge Lodge's comments out of context when they state that Judge Lodge "ruled from the bench" that he would not disqualify himself at the February 1, 1993 conference. Although Judge Lodge expressed doubt that there was a sufficient basis for recusal, Judge Lodge allowed Petitioners to conduct the requested discovery.

Contrary to the statement in their brief, Petitioners did not conduct discovery concerning the employment of Judge Lodge's relatives "over several months." Petitioners took all of the depositions of Judge Lodge's brother, sister-in-law, and nephew

on March 12, 1993. Petitioners also misstate the record when they contend in their brief that Judge Lodge's sister-in-law was a Vice-President of West One Bancorp as of December of 1992. She had retired from West One Bancorp by November 1, 1991 after marrying Judge Lodge's brother on March 21, 1991. Furthermore, although she briefly held a title of Vice-President prior to her retirement, she had no policy making role and was not an "officer" of West One Bancorp. Judge Lodge's brother, Norman Lodge, retired from the Bank on March 5, 1993. R. 342-350.

Petitioners indicated at the February 1, 1993 conference that they would complete discovery within sixty days and file a motion to disqualify if the discovery disclosed any grounds for disqualification. P. App. L, pp. 79-80. However, the Petitioners did not move to disqualify Judge Lodge within the sixty day period. As expressly recognized by the Ninth Circuit, Petitioners "contend that Judge Lodge denied oral requests for recusal on two prior occasions, but the record shows that Petitioners' actions never amounted to such a request. Rather, discovery on the issue was discussed in proceedings before the Court on February 1, 1993, and Judge Lodge refrained from recusing himself." P. App. A, p. 5, n.2.

Instead of moving to disqualify Judge Lodge, Petitioners filed their opposition to Respondents' motions to dismiss filed on December 10, 1992 and participated in the hearing held on May 18, 1993 before Magistrate Judge Williams. Magistrate Williams entered his Report and Recommendation on June 18, 1993, recommending dismissal of Petitioners' remaining claims. P. App. E, pp. 27-40. Petitioners filed an objection to the Report and Recommendation on June 28, 1993 which they knew would be reviewed by Judge Lodge.

On November 2, 1993 Judge Lodge entered an Order approving the Report and Recommendation to dismiss

Petitioners' action. P. App. D, pp. 21-26. Finally upon learning of Judge Lodge's adverse decision dismissing their remaining claims and after delaying for almost eight months after conducting formal discovery on the issue, Petitioners filed their motion to disqualify Judge Lodge and to vacate his rulings pursuant to Federal Rule of Civil Procedure 60(b)(6) on November 5, 1993. R. 188.

On February 24, 1994, Judge Lodge denied the motion for disqualification, stating three basic reasons for his ruling. First, Judge Lodge concluded the motion was untimely because it was filed years after the case began and months after discovery of his relatives' employment status. Second, Judge Lodge recognized that there was no evidence that his relatives were directly or indirectly involved with the subject matter of the litigation. Relying upon the Ninth Circuit's decision in *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864 (9th Cir. 1991) (section 455(a) recusal not required when judge's son was employed by party in nonmanagement position), Judge Lodge concluded that his relatives' employment status alone would not lead a reasonable person to conclude that his impartiality might reasonably be questioned. R. 342-350.

Finally, Judge Lodge stated that it appeared to the Court that Petitioners' motion for disqualification was "simply a tactic to frustrate the judicial system in response to rulings in favor of the defendants" and that it was only after an unfavorable ruling dismissing the case that the Petitioners filed their motion. R. 346-347. Judge Lodge also awarded the Respondents $150,000 in attorneys' fees. R. 347-350.

The Petitioners appealed, contending that the removal was improper, that their claims should not have been dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6), that Judge Lodge should have granted the motion for disqualification and that the attorneys' fees award was not justified.

The Ninth Circuit conducted a *de novo* review of both the removal issue and the dismissal of claims, and affirmed the District Court's decision. With regard to the disqualification issue, the Ninth Circuit concluded that because the Petitioners failed to move for disqualification for nearly eight months after they ascertained the grounds set forth in their motion and after the Court dismissed their claims, that the District Court did not abuse its discretion in finding the motion untimely and denying relief from the Court's prior Orders dismissing the claims. The Ninth Circuit Court noted that it was not until the time that the motion was filed that Petitioners fully explained why Judge Lodge should have recused himself. P. App. A, pp. 1-10.

The Ninth Circuit did conclude, however, that under 28 U.S.C. § 455(a) Judge Lodge abused his discretion by failing to recuse himself when the motion was finally filed and he had been fully apprised of the grounds for recusal. The Ninth Circuit concluded that a reasonable person would question his impartiality because his brother, sister-in-law and nephew were employees of the Bank at one time or another while this case was before him. As a result, the Ninth Circuit vacated Judge Lodge's subsequent Order awarding attorneys' fees to Respondents and remanded the question to a different judge. The Ninth Circuit stated that it was making this ruling to prevent "undermining the public confidence in the judicial process." *Citing Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988). P. App. A, pp. 1-10.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT'S DECISION TO VACATE ONLY THOSE ORDERS OF THE DISTRICT COURT THAT WERE ENTERED AFTER THE PETITIONERS FILED A MOTION TO DISQUALIFY DISTRICT JUDGE LODGE IS NOT CONTRARY TO THE DECISIONS OF THIS COURT AND DOES NOT VIOLATE DUE PROCESS.

A. The Ninth Circuit's Decision To Deny Petitioners' Request For The Remedy Of Vacatur Of Judge Lodge's Orders Entered Prior To Their Motion To Disqualify Was Consistent With This Court's Decision In *Liljeberg*.

Petitioners argue that this Court should grant a writ of certiorari to "close a gap" created by *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). However, a careful review of *Liljeberg* and their argument reveals that the Petitioners are actually requesting this Court to reject that decision and adopt a rule of automatic, retroactive vacatur whenever a judge should have recused himself under section 455(a), but failed to do so, without regard to the timeliness of the complaining party's motion to disqualify and that party's knowledge of the grounds for disqualification. The adoption of such a rule would inevitably lead to "legal gamesmanship," "sandbagging" and "judge shopping" regarding the timing of filing motions to disqualify federal judges as evidenced by this case.

The Ninth Circuit's decision in this case denying vacatur of Judge Lodge's Orders until after Petitioners filed their belated motion for disqualification was consistent with the rationale and pronouncements in *Liljeberg*. Furthermore, Circuit Court

decisions subsequent to *Liljeberg* are consistent with the decision of the Ninth Circuit in this case. There is no conflict that exists between the Circuit Courts on the issues presented in this case. Thus, there is no reason for granting certiorari. Supreme Court Rule 10.

In *Liljeberg*, this Court undertook the first significant interpretation of the 1974 amendments to 28 U.S.C. § 455. In particular, this Court addressed whether a judge can be disqualified under Section 455(a) even though not conscious of the circumstances that might cause his impartiality to be questioned, and second, when vacatur pursuant to Fed. R. Civ. P. 60(b) is an appropriate remedy.

The *Liljeberg* Court recognized that although Section 455 defines the circumstances that mandate disqualification of federal judges, it neither prescribes nor prohibits any particular remedy for a violation of that duty and that Congress had wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation. The Court also expressly stated that in considering the appropriate remedy for a violation of Section 455(a), the Court of Appeals is in "a better position to evaluate the significance of the violation" and that its "judgment as to the proper remedy should thus be afforded our due consideration." *Id.* at 862.

The Petitioners in this case filed their motion to disqualify Judge Lodge almost eight months after they had ascertained, by conducting requested discovery, the potential grounds for disqualification set forth in their motion and after the dismissal of all of their claims. Based upon this delay, the Ninth Circuit found it appropriate to deny Petitioners' Rule 60(b)(6) motion to vacate Judge Lodge's decisions entered prior to the filing of Petitioners' motion for disqualification.

In *Liljeberg*, the Court affirmed the Court of Appeals' determination to allow a new trial. In reaching its conclusion, the *Liljeberg* majority noted that Section 455 does not, by itself, authorize the reopening of closed litigation. The Court recognized that Rule 60(b) provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment. The Court noted that Rule 60(b)(6) grants federal courts broad authority to relieve a party from a final judgment "upon such terms as are just," provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5). *Id* at 863.

The Court expressly confirmed the continuing applicability of previous Supreme Court decisions cautioning that the remedy of vacating judgments under Rule 60(b)(6) should only be applied in "extraordinary circumstances," and that Rule 60(b)(6) relief is neither categorically available nor categorically unavailable for all Section 455(a) violations. *Id.* at 863. The *Liljeberg* majority stated that in considering the availability of vacatur as an appropriate remedy that three factors should be considered: "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* at 864. The Court then examined the case before it in light of these factors.

As noted above, the Ninth Circuit's decision to affirm a portion of the District Court's decision denying vacatur of Judge Lodge's Orders prior to Petitioners' motion for disqualification and vacatur pursuant to Rule 60(b)(6) is based upon the Petitioners' delay in filing that motion. In *Liljeberg*, the majority found it significant to expressly address the fact that the motion for disqualification and vacatur of the judgment in that case had been filed ten months after the Court's final decision, but promptly after the basis for recusal was discovered. The

Liljeberg court expressly stated that a delay of ten months after the affirmance by the Court of Appeals "would normally foreclose relief based on a violation of Section 455(a)." *Id.* at 869. However, the *Liljeberg* majority concluded that the delay in filing the motion in that case "did not involve neglect or lack of due diligence" but was caused by the judge's failure to inform the parties of the facts which were the basis of the grounds for disqualification and that those facts would not have been made apparent through the examination of judicial disclosure reports. *Id.* at 864, n.11. Under those circumstances, the Court concluded that the remedy of vacatur was not prohibited. The Petitioners cannot reasonably contend that their delay was similarly justified.

The Petitioners filed their motion for disqualification after Judge Lodge entered his final order dismissing the Petitioners' remaining claims. As recognized by the Ninth Circuit, Petitioners delayed filing their motion for disqualification for nearly eight months after they had ascertained all of the grounds set forth in their motion. The Ninth Circuit concluded that the District Court did not abuse its discretion in finding the motion untimely and denying relief from its prior orders dismissing the claims. *See Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993).[2]

B. Analysis Of *Liljeberg's* Three Factors Demonstrates That Denial Of Vacatur Was Appropriate.

An analysis of *Liljeberg's* three factors leads to the

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2. Consistent with *Liljeberg*, the Ninth Circuit expressly recognized that although 28 U.S.C. §455 is self-enforcing on the part of the judge, a party having information that raises a possible ground for disqualification may not wait until after an infavorable judgment to bring the information to the judge's attention. *E & J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992). The Ninth Circuit also correctly concluded that the motion must be made with reasonable promptness after the ground for such a motion is ascertained. *Id.*

conclusion that vacatur of all of Judge Lodge's rulings in this case was not required or appropriate.[3] Indeed, under the expressed standard in *Liljeberg*, the Ninth Circuit could have concluded that the Petitioners' motion to disqualify was untimely and affirmed Judge Lodge's ruling awarding attorneys' fees subsequent to Petitioners' motion to disqualify. Regarding the first factor, there is no indication of any risk of injustice to the parties in the case if the Orders entered prior to the motion to disqualify are not vacated. Judge Lodge adopted the order addressing the remand motion and two different Reports and Recommendations of Magistrate Judge Williams recommending the dismissal of claims under Rule 12(b)(6). More importantly, the Ninth Circuit actually conducted a *de novo* review of both the dismissal of the Petitioners' Complaint and the remand issue on appeal. Finally, discovery revealed that Judge Lodge's relatives had no involvement with the case and Petitioners have never even suggested that any actual bias or prejudice existed in the case.

Regarding the second factor identified in *Liljeberg*, there is nothing in the record demonstrating that the denial of the requested relief will produce injustice in other cases and the Petitioners present no argument that such will occur.

The third factor is the risk of undermining public confidence in the judicial system. Again, there is no indication that such a

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3. In *Liljeberg*, the majority stated:

> Rule 60(b)(6) relief is accordingly neither categorically available nor categorically unavailable for all § 455(a) violations. We conclude that indetermining whether a judgment should be vacated for a violation of § 455(a),it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, andthe risk of undermining the public's confidence in the judicial process.

risk exists in this case. The fact that Judge Lodge's rulings were the same as Judge Williams and were reviewed *de novo* by the Ninth Circuit should eliminate any potential for undermining the public confidence. To the contrary, the First Circuit Court has recently recognized that granting vacatur in a case such as this could actually have the effect of undermining the public's confidence in the judicial system by sanctioning "judge shopping" and rewarding "sandbagging" and "litigation gamesmanship" by attorneys. *In re Cargill*, 66 F.3d 1256 (1st Cir. 1995).

In *Cargill*, the First Circuit was highly critical of the Cargill's delay in filing a motion for recusal approximately one month after becoming aware of the potential grounds for recusal when that motion was filed shortly after an adverse decision. The court criticized Cargill for holding its Section 455(a) argument in reserve and deferring any recusal initiative awaiting the motion to dismiss. 66 F.3d at 1263. The court stated that Cargill's delay has the "appearance of judge-shopping." *Id.* at 1264. In denying Cargill's writ of mandamus the First Circuit recognized by allowing such a delay in filing a motion for recusal that there is a "risk of eroding public confidence in the courts by seeming to reward a litigant for its gamesmanship." *Id.* at 1264. *See, e.g., Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986) ("Counsel, knowing the facts claimed to support a Section 455(a) recusal for appearance of partiality may not lie in wait, raising the recusal issue only after learning of the Court's ruling on the merits.") *cert. denied*, 481 U.S. 1016 (1987).

Petitioners have never even suggested that they have a justifiable reason for the eight month delay in filing their motion for disqualification of Judge Lodge in this case. They simply argue for the adoption of an inflexible rule of automatic vacatur whenever a judge knows or should have known of a basis for recusal. The adoption of such a rule has no support in § 455 or the

case law of any federal court. It would undoubtedly result in a waste of judicial resources as it would become a tactical advantage, without risk to the litigants and their attorneys, to delay filing a motion to disqualify until after the judge announces his decision.

The Ninth Circuit's decision to deny vacatur based on Petitioners' untimely motion also has statutory support from Congress' decision to expressly recognize that a § 455(a) disqualification can be waived by the parties. 28 U.S.C. § 455(e). Section 455(e) provides that a Section 455(a) ground for disqualification may be waived if preceded by full disclosure on the record of the basis for disqualification. In this case, the Petitioners obtained full disclosure by conducting the discovery completed in March of 1993. However, they delayed filing a motion to disqualify for almost eight months after completing that discovery, although they suggested to the district judge that a motion would be filed in 60 days if a basis for disqualification was discovered. Several courts addressing similar situations have held that such a delay may constitute an implicit waiver under § 455(e).

In *United States v. Nobel*, 696 F.2d 231 (3rd Cir. 1982), a criminal defendant's lawyer did not object to the district judge's failure to disqualify himself under Section 455(a) after full disclosure of the relevant facts which later served as the grounds on which new counsel based a disqualification motion. The Third Circuit held that under the circumstances the failure to object and the election to proceed in the case constituted a waiver of disqualification covered by Section 455(e). 696 F.2d at 236-237. *See, e.g., United States v. Brinkworth*, 68 F.3d 633, 638 (2nd Cir. 1995).

C. The Self-Enforcing Nature Of § 455(a) Does Not Mandate Automatic Vacatur Of Judge Lodge's Prior Decisions.

The Petitioners also argue that the Ninth Circuit's decision

ignores Judge Lodge's independent duty to recuse himself and that he had an "absolute duty" to investigate and be aware of the employment status of his close relations. Petitioners' argument is without merit. Although the Ninth Circuit expressly recognized that Section 455 is "self-enforcing," the issue was whether a remedy of vacatur was required under Rule 60(b)(6) when the Petitioners delayed pursuing disqualification for eight months, until after all of the claims in the case had been dismissed. Consistent with this Court's decision in *Liljeberg* and other courts addressing the effect of delay in filing a motion to disqualify, the Ninth Circuit correctly concluded that vacatur was not required. Furthermore, a judge is not statutorily required to conduct the breadth of investigation of his relatives as suggested by Petitioners. Section 455(c) only requires a judge to inform himself about the "personal and fiduciary financial interests" of his spouse and minor children residing in his household, which was not at issue in this case.

D. Section 455(b)(5)(i) Has No Relevance To The Issues Presented In This Case.

Petitioners argue that as a result of the February 1, 1993 in chambers conference, Judge Lodge had an obligation to determine whether any of his close relatives were officers of either corporation under 28 U.S.C. § 455(b)(5)(i). The Petitioners then incorrectly state that if Judge Lodge had conducted such an investigation, he would have determined that his sister-in-law was an "officer" of West One Bancorp. That contention misstates the record in this case. Although Judge Lodge's sister-in-law did hold the title of "Vice-President," she had left her employment with the Respondents more than one year prior to the February 1, 1993 conference, having retired November 1, 1991. Furthermore, the record in this case established that Sandra Lodge was not an "officer" as that term is used in Section 455(b)(5)(i) because she had no policy making

role. *E.g., Hewlett Packard Co. v. Bausch & Lomb, Inc.*, 882 F.2d 1556 (Fed. Cir. 1989).[4]

E. Denial Of Vacatur Is Not A Violation Of Due Process.

Petitioners also suggest the Ninth Circuit's decision to deny vacatur of all of Judge Lodge's Orders constituted a violation of due process, citing the Court's decision in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). That decision does not support such a determination and, to the contrary, supports the opposite conclusion. In that case, a justice of the Alabama Supreme Court had declined to recuse himself from participation in a case deciding whether a claim of bad faith tort was a valid cause of action in the State of Alabama. The justice whose disqualification was sought had cast the deciding vote (5-4 vote) in that case. At that time, the justice had a suit pending in which he was a party in another Alabama Court raising the same issue. As a result of the Alabama Supreme Court's decision, the judge obtained a substantial economic benefit from the other litigation in which he was a party. In *Aetna* the majority recognized that the judge was effectively acting as "a judge in his own case," and

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4. The record below established that, at relevant times, West One Bancorp employed 4,692 employees, 407 of which were Vice-Presidents. Supp. R. 60. The Bank and West One Bancorp employed 56 senior vice-presidents and 14 executive vice-presidents. Supp. R. 60; R. 200. However, only the senior vice-presidents and executive vice-presidents hold high enough positions to have the authority to make policy decisions. Supp. R. 60; R. 200. Sandra Lodge was employed as an assistant manager of the contract funding department of West One Bancorp from 1987 until she left in November of 1991. The department purchased real estate contracts. R. 203. In 1989, two years prior to becoming Judge Lodge's sister-in-law, Sandra was given a change in title only, to Vice-President of Operations for the Contract Funding Department. This change in title did not change her duties or responsibilities whatsoever. R. 207.

held that refusing to recuse himself violated due process.[5] The majority decision in *Aetna* was based on the judge's "direct stake in the outcome of the case." However, the *Aetna* court expressly recognized that a successful due process challenge may be limited, even when there are allegations of "bias or prejudice," stating: "Certainly only in the most extreme cases would disqualification on this basis be constitutionally required." 475 U.S. at 821.

Respondents still believe that contrary to the decision of the Ninth Circuit, the employment status of Judge Lodge's relatives did not require recusal under Section 455(a) in this case. In any event, it cannot reasonably be contended that this case presents the type of "extreme case" necessitating the protection of the due process clause.

F. The Ninth Circuit's Decision Is Not In Conflict With Any Other Circuit Or District Court Decision.

Finally, it should be recognized the Petitioners do not contend that the Ninth Circuit's decision is inconsistent with any other circuit court or lower court decision. To the contrary, decisions found by Respondents are all consistent with the Ninth Circuit's decision to deny vacatur of Judge Lodge's Orders. *E.g.*, *United States v. Brinkworth*, 68 F.3d 633, 639 (2d Cir. 1995) ("a prompt filing avoids the risk that a party is holding back a recusal application as a fall-back position in the event of adverse rulings in pending matters"). *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994) (vacatur of prior rulings not necessary for Section 455 disqualification); *In re: School Asbestos Litigation*, 977 F.2d 764 (3rd Cir. 1992) (vacatur of rulings by judges who failed to

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5. The *Aetna* court concluded that its decision was supported by its earlier decision in *Tumey v. Ohio*, 273U.S. 510 (1927); *In re Murchison*, 349 U.S. 133 (1955); *Ward v. Village of Monroeville*, 409 U.S. 57(1972). Those cases also do not support the Petitioners contention that a due process violation occurred in this case.

disqualify themselves for appearance of partiality ought to be as limited as possible); *Apple v. Jewish Hosp. & Medical Ctr.*, 829 F.2d 326, 334 (2d Cir. 1987) (noting that a "movant may not hold back and wait, hedging its bets against the eventual outcome"); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986) ("counsel, knowing the facts claimed to support a Section 455(a) recusal for appearance of impartiality may not lie in wait, raising the recusal issue only after learning of the court's ruling on the merits."), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987); *Rohrback v. AT&T Nassau Metals Corp.*, 1996 WL 77637 (M.D. Pa. 1996) (inflexible rule requiring vacatur is inappropriate).

II.

THE NINTH CIRCUIT PROPERLY CONCLUDED THAT THE DISTRICT COURT WAS NOT REQUIRED TO REMAND THIS CASE TO STATE COURT.

The Petitioners filed this case in state court on August 17, 1989. On September 15, 1989 the attorneys representing both the Bank and its parent, West One Bancorp, filed and served a Petition for Removal. Contrary to the suggestion in Petitioners' Brief, West One Bancorp and the Bank were the only Respondents that had been served prior to the filing of the Petition for Removal. The individual Defendants had still not been served. R. 29-31, 40-51, 55.[6] West One Bancorp was not expressly named in that Petition. However, the in-house lawyer that accepted service of the Complaint for both of the Corporate Respondents did verify the removal petition.

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6. It is well settled that defendants who have not been served at the time the Petition for Removal is filed need not join in the Petition. *E.g., Salverson Salverson v. Western States Bankcard Assn.*, 731 F.2d 1423, 1429 (9th Cir.1984)

Magistrate Judge Williams and District Judge Lodge both concluded that the Petition for Removal was not fatally flawed and granted Respondents' motion for leave to file and amend the petition to correct the procedural deficiency pursuant to 28 U.S.C. § 1653. The Ninth Circuit conducted a *de novo* review of this issue and affirmed the decision that remand to state court was not required.

It is undisputed that the District Court had subject matter jurisdiction over this case. The Ninth Circuit did not err in affirming the denial of Petitioners' motion for remand for two basic reasons. First, West One Bancorp had consented to removal and that consent had been sufficiently manifested. Second, both the Magistrate Judge and the District Judge appropriately granted leave to file an amended notice of removal to allow all Defendants to join in the Petition for Removal.

The removal statute does not require that every defendant actually sign a removal petition. 28 U.S.C. § 1446. Nonpetitioning defendants may simply consent to the removal of the action, thereby satisfying the substantive requirement that the defendants be unanimous in their choice of a federal forum. *Hernandez v. Six Flags Magic Mountain, Inc.*, 688 F. Supp. 560, 562 (C.D. Cal. 1988).

In this case, West One Bancorp's consent was manifested by its attorneys filing the Petition for Removal. The Bank is a wholly-owned subsidiary of West One Bancorp. Letters from Petitioners' counsel prior to the filing of the Petition for Removal, submitted to Magistrate Judge Williams, demonstrated that Petitioners were aware that the Bank's in-house counsel, who verified the initial Petition for Removal, also represented West One Bancorp. The Bank and West One Bancorp shared corporate offices where Petitioners served both of those entities by delivering copies of the complaint to a single

individual. R. 92-93. Thus, the filing of the removal petition in and of itself sufficiently manifested West One Bancorp's consent.

Even if West One Bancorp did not sufficiently manifest its consent to the removal, it was not inappropriate to grant Defendants leave to amend their removal petition. The time limitation for removal is not jurisdictional. *Hernandez v. Six Flags, supra*, at 562. Where the District Court has jurisdiction, it has the power to consider an untimely removal petition and remand is not mandatory. *Id. Glover v. W.R. Grace & Co.*, 773 F. Supp. 964 (E.D. Tex. 1991) (where diversity jurisdiction existed, court would not remand action based on defendant's consent to removal being four days late).

The right to amend pleadings under Section 1653 includes amending removal petitions. *Barrow Development Co. v. Fulton Ins. Co.*, 418 F.2d 316, 317 (9th Cir. 1969). An amendment under Section 1653 may be allowed at any time, especially when it appears that the District Court clearly had subject matter jurisdiction and defendants have been allowed to supplement their pleadings to join in a removal petition after the expiration of the thirty day removal period. *E.g., In re First Nat'l Bank*, 70 F.3d 1184, 1189 (11th Cir. 1995); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 369 (7th Cir. 1993); *Sicinski v. Reliance Funding Corp.*, 461 F. Supp. 649, 652 (S.D.N.Y. 1978). The Eleventh Circuit has gone beyond simply allowing the amendment of a removal petition and actually deemed the petition to have been amended to include a defendant that did not join in the removal petition. *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277 (11th Cir. 1987). *See also, Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1193 n.1 (9th Cir. 1988)(matter remanded to District Court with instructions "to permit amendment of the removal petition to name all proper defendants" in order to prevent a pleading omission that would "otherwise render the removal petition procedurally defective.").

In this case, there is no dispute that the District Court had subject matter jurisdiction. Furthermore, the Petitioners have not asserted that they were prejudiced by the amended notice of removal. The thirty day removal rule is designed to deprive defendants of a tactical advantage of waiting to see how a state court case is proceeding before removing and to prevent delay and the waste of resources before beginning a federal court case. *E.g., Ford v. New United Motors Mfg.*, 857 F. Supp. 707, 709-710 (N.D. Cal. 1994); *Hernandez v. Six Flags, supra*, 688 F. Supp. at 563. No allegations of prejudice have been made in this case. In fact, the amendment of the petition precluded the "great and needless waste of judicial time and effort, real prejudice to the parties, and severe injustice" which would have resulted from remand. *LeNeave v. North Am. Life Assurance Co.*, 632 F. Supp. 1453, 1455 (D. Minn. 1986). This case has been pending since 1989. To remand this action now would unduly delay this proceeding, cause the parties to incur significant attorney fees to relitigate issues that have already been determined, and will result in the waste of significant judicial resources.

In conducting its *de novo* review of the District Court's denial of Petitioners' motion to remand, the Ninth Circuit correctly recognized that 28 U.S.C. § 1447(c) only requires the District Court to remand the case to the state court if it lacks subject matter jurisdiction. Procedural defects in removal are not jurisdictional and such defects may be waived. *Nolan v. Boeing Co.*, 919 F.2d 1058, 1063 n.6 (5th Cir. 1990), *cert. denied*, 499 U.S. 962 (1991). Because the District Court had jurisdiction under 28 U.S.C. § 1331, the Ninth Circuit did not err in allowing a "waiver" of any technical requirement that both served defendants actually sign the removal documents where the other served defendant filed a petition for removal within thirty days of the filing of the Complaint and the defendant filing the removal petition was represented by the same attorney and was a wholly owned subsidiary of the other served defendant.

In their brief Petitioners suggest that the District Court's decision is in conflict with Circuit Court decisions *In re Continental Cas. Co.*, 29 F.3d 292 (7th Cir. 1994); *Page v. City of Southfield*, 45 F.3d 128 (6th Cir. 1995); and *In re Allstate*, 8 F.3d 219 (5th Cir. 1993). Such a suggestion is not correct. In those cases the Circuit Courts simply concluded that a District Court cannot remand a case on its own motion for a defect in removal procedure. That issue is not involved in this case. Furthermore, at least one of those cases directly supports the conclusion reached by the Ninth Circuit in this case. In *In re Allstate*, *supra*, the Fifth Circuit, in reaching its conclusion that the District Court could not *sua sponte* remand the case to state court, recognized that where subject matter exists, procedural shortcomings can be cured by resort to 28 U.S.C. § 1653.

As discussed above, it is well recognized that any procedural deficiency in a petition for removal may be cured by resort to 28 U.S.C. § 1653. Contrary to Petitioners' contention, the Ninth Circuit's decision does not render meaningless the thirty day time limit in Section 1446(b). The Ninth Circuit did not rule that the District Court was prohibited from remanding the case to state court. Rather, the Ninth Circuit simply concluded that the District Court did not err by rejecting Petitioners' motion for remand under the circumstances in this case. There is no conflict among the Circuit Courts.

CONCLUSION

For the reasons discussed above, the petition for writ of certiorari should be denied.

Dated: March 18, 1996

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 19, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 94-35275

D.C. NO. CV-89-01248-EJL

JOHN L. SHELSTAD; CHARLES E. MINSHEW; KEITH A. WATSON,

Plaintiffs-Appellants,

v.

WEST ONE BANK, fka THE IDAHO FIRST NATIONAL BANK, a national banking association; WEST ONE BANCORP, fka Moore Financial Group, Inc., et al.,

Defendants-Appellees.

Before: WRIGHT, SKOPIL and THOMPSON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judge Thompson has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for

rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED.**

Supreme Court, U.S.
FILED
APR 19 1996
CLERK

No. 95-1255

In The

Supreme Court of the United States

October Term, 1995

JOHN J. SHELSTAD, CHARLES E. MINSHEW and KEITH A. WATSON,

Petitioners,

v.

WEST ONE BANK (IDAHO) f/k/a THE IDAHO FIRST NATIONAL BANK, a national banking association; *et al.*,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ARGUMENT

I. THE PETITION FOR CERTIORARI WAS TIMELY FILED.

Respondents suggest that the Petition for Certiorari was not timely filed. This argument is incorrect as a matter of law.

To support their argument – an argument which they failed to raise before the Ninth Circuit – the Respondents rely on two inapposite cases. In *Gypsy Oil Co. v. Escoe*, 275 U.S. 498 (1927), this Court stated that, pursuant to the rules which existed in 1927, the time to file a petition for certiorari runs from the denial of the second petition for rehearing, if it is properly and timely filed. 275 U.S. at 499. In *Morse v. United States*, 270 U.S. 151, 153 (1926), the Court quoted the then-existing rule as requiring that no second motion for a new trial may be submitted after the decision on the first motion for new trial unless the Court grants leave to file a second motion. A review of the current rules does not suggest that there is any similar restriction on filing petitions for rehearing.

In fact, the second petition for rehearing was taken from the Amended Memorandum entered by the Ninth Circuit, which itself resulted from the first petition for rehearing. The Respondents have not cited to or quoted from any rule prohibiting a petition for rehearing after the Ninth Circuit issues an Amended Memorandum. To suggest that the Petitioners have no opportunity to seek a rehearing on an amended memorandum would exalt form over substance.

II. SECTION 455 IS SELF-EXECUTING AT ALL TIMES.

Respondents suggest that Section 455(a) is self-executing only until the Petitioners inform the Court of the facts, known to the Court and to the Respondents, which mandate recusal. Respondents suggest that once Petitioners learn of the facts that were concealed from them,

and which the Court neglected to disclose, the self-enforcement provision of Section 455(a) vanishes. At that point, according to the argument of the Respondents, the burden of enforcement of judicial integrity shifts to the Petitioners and recusal is mandated only upon the filing of a written motion restating what the Court acknowledged that it knew all along. This suggestion is a reflection of the perverse approach to justice that the Respondents employ to avoid any scrutiny of their actions by a Court which has neither actual bias, nor any appearance of bias.

The fallacy – and inherent danger – of the Respondent's argument is exemplified by the comments of Judge Lodge during the only occasion in this case where he chose to go on the record with his position. During the February 2 chambers conference, Judge Lodge stated that he was sensitive to the requirements of Section 455(a) and that he had been deciding West One cases since he had come to the federal bench. He expressed that he had "duty to sit" on all of the cases involving the Respondents in the District of Idaho because the other sitting U.S. District Court Judge had disqualified himself from all cases involving West One due to a conflict. App. L at 84-85. *Cf. In re School Asbestos Litigation*, 977 F.2d 764, 784 ("a district judge has no 'duty to sit' and . . . may not sit where his or her impartiality may reasonably be questioned and the parties refuse to waive that objection." *See* H. R. Rep. No. 93-1453, 1974 U.S. C.C.A.N. at 6355).[1]

As the Respondents admit, Judge Lodge asserted that he knew of the employment of all three of his relatives for

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[1] Nevertheless, the record does not suggest that Judge Lodge, despite his sensitivity to Section 455, ever requested an advisory opinion from the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States. He also never felt comfortable enough to disclose these relationships to the litigants before him.

over a year before Petitioners learned of these relationships. App. L pp. 84-85. Respondents acknowledged that it was the Court's obligation to make "the initial determination whether there is any basis for disqualification." App. L at 80-81. Respondents let the Court know that they intended to do everything in their power to continue its subterfuge:

> This case has been around a long, long time. I'm confident that the Court did not see any basis for disqualification by stirring up this hornet's nest, going off and making a bunch of depositions trying to make a big deal.
>
> I wonder if Plaintiffs are the ones giving the appearance of some type of impropriety.

Id. Respondents stated that the Petitioners' inquiry "was a witch hunt we don't want to participate in this late in the case." *Id.* Needless to say, the Ninth Circuit Court of Appeals did not view this inquiry as a "witch hunt." However, it also erroneously concluded that so full and frank a discussion of the issues on the record was not sufficient to mandate the Court's self-executing obligation to ascertain and review the facts and recuse itself if appropriate.

III. JUDGE LODGE WAS REQUIRED BY SECTION 455(B)(5)(b)(i) TO KNOW HIS SISTER-IN-LAW'S POSITION WITH THE RESPONDENTS.

Section 455(B)(5)(b)(i) required Judge Lodge to know precisely the nature and extent of his sister-in-law's employment relationship with a party to the case. That inquiry would be necessary so as to determine whether disqualification was mandated, and could not be waived, Section 455(e), because a "person within the third degree of relationship to either of them or the spouse of such a person . . . is . . . an officer, director or trustee of a party." His failure to do so is a separate violation of 11 U.S.C. Section 455. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 867-868 (1986).

IV. RESPONDENTS' CASES DO NOT SUPPORT THEIR POSITION.

Respondents' reliance on *In re Cargill, Inc.*, 66 F.3d 1256 (1st Cir. 1995), is badly misplaced. In *Cargill*, the First Circuit denied a petition for writ of mandamus. The *Cargill* Court ruled that, under the circumstances, the issue of the judge's impartiality could be decided on direct appeal, at the end of the case, rather than by mandamus sought immediately after the judge denied a motion to recuse. The *Cargill* Court specifically stated:

> An end-of-case appeal is a matter of right, while mandamus is a matter of discretion. Courts have frequently found that difference dispositive in analogous circumstances. *See, e.g., Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 101 S. Ct. 188, 189-90, 66 L. Ed. 2d 193 (1980) (per curiam); *In re Bushkin Assocs.*, 864 F.2d 241, 244 (1st Cir. 1989). And, moreover, the fact that a lengthy trial has intervened will not rob an appeal of its effectiveness. *See, e.g., Stauble v. Warrob, Inc.*, 977 F.2d 690 (1st Cir. 1992) (vacating judgment on direct appeal following 35-day trial, despite the circuit court's earlier denial of mandamus relief on same grounds).

Cargill, 66 F.3d at 1264, n.10.

Cargill, if anything, supports the Petitioners' position rather than Respondents'. Unlike the present case, Cargill at one time expressly waived, pursuant to 28 U.S.C. Section 455(e), the grounds he later asserted in his motion to recuse. 66 F.3d at 1264. Not even these Respondents assert that the Petitioners ever affirmatively waived Judge Lodge's conflict. Second, the *Cargill* trial court acknowledged his obligation to disclose potential disqualifying factors and seek a waiver from the parties as a precondition to continue. *Id.* at 1265 (Appendix). Here, Judge Lodge never suggested he had to disclose any of these relationships, or any other relationship he had with Respondents. He denied on three occasions that there

were any disqualifying factors. He never requested, let alone received, a waiver of the conflict.

Similarly, *United States v. Nobel*, 696 F.2d 231, 236 (3rd Cir. 1982), also supports the Petitioners' position by recognizing that an in-chambers conference is sufficient to put the Court and all parties on notice of disqualifying factors and compel appropriate action. In contrast to *Nobel*, there can be no suggestion that the Petitioners did anything other than demonstrate that Judge Lodge should recuse himself, and Judge Lodge recognized that fact by refusing on three occasions during the in-chambers hearing to do so. The Ninth Circuit determined unanimously that the grounds discussed at the in-chambers hearing and formalized in the Petitioners' written motion constituted grounds for recusal. Two of the three members of the Ninth Circuit panel refused to accept the in-chambers conference as sufficiently presenting the issues to Judge Lodge.

Respondents' reliance on *Phillips v. Amoco*, 799 F.2d 1464 (11th Cir. 1986) also is misplaced. In contrast to the facts of this case, the *Phillips* Court determined *unanimously* that the district court *did not* abuse its discretion in refusing to recuse itself. In contrast to this case, there is no suggestion that the moving party had immediately informed the trial court, formally or informally, that it had any concerns about the appearance of partiality.

V. PETITIONERS ARE NOT JUDGE SHOPPING.

Respondents suggest that Petitioners are attempting to judge shop by waiting until the Court issued an adverse decision and then moving for recusal. This contention bears no resemblence to the facts of this case. The Petitioners fought vigorously to keep this case in the forum that they chose – the state courts of Idaho. They did so by seeking to have the case remanded. Upon the denial of their timely motion to remand, the Petitioners requested Judge Lodge to certify the defective removal issue for interlocutory appeal – a request which Judge

Lodge denied. Following this denial by Judge Lodge, the Petitioners filed a writ of mandamus with the Ninth Circuit to have the case remanded to where it belonged. All of this took place before the Petitioners learned of Judge Lodge's intimate relationship with the defendants. And at no time during these proceedings did Judge Lodge apprise the Petitioners of the employment relationships of his close relatives.

Plaintiffs presented an adequate factual basis for disqualification on the record in February 1993. They did not hide the ball or the facts waiting to see if Judge Lodge might later render a favorable ruling.

VI. THERE IS NO TIMELY MANIFESTATION BY OTHER DEFENDANTS TO WEST ONE'S REMOVAL PETITION.

Respondents assert, without any citation to the Appendix, that West One Bancorp timely manifested its consent to the removal petition. Respondents Brief at p. 23. This contention is wrong and not borne out by the record in this case. The record is clear that only West One consented to removal, and that is not enough to allow the removal of this case from the state court where it belonged.

Respondents seek to create a legal fiction that the acts of one legal entity are the acts of all related entities. Given the ease with which any party can truly manifest consent – signing the petition or filing any written document, stating "I consent to removal" and signed by an appropriate agent or officer of the corporation – this legal fiction need not be created. This legal fiction takes away the right of a legal entity to not consent.

28 U.S.C. Section 1447(c) provides for the remand of a matter to state court on the basis of any defect in removal procedure. It establishes a limited thirty-day period of time to seek remand based upon a defect in procedure. As the overwhelming case law concludes, the statute does not give the court discretion to not remand if the

removing parties had failed to meet the requirements of remand.

Section 1447(c) mandates the remand of the case at *any* time it appears that the Court does not have jurisdiction. As the overwhelming majority of cases state, the failure to have all defendants join in or consent to removal renders removal defective and mandates remand. The removal statute requires defendants to file or join in a removal petition "within thirty days after receipt by the defendant, through service or otherwise, a copy of the initial pleading setting forth the claim for relief . . . or within thirty days after the service of summons upon the defendant . . . whichever period is shorter." 28 U.S.C. Sections 1441(a), 1446(b).

Congress has specifically allowed courts to expand the time in which removal may be had in specific circumstances. See 28 U.S.C. Section 1441(d) ("where removal is based on this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.") In all other instances, Congress has chosen not to expand time limitations in which a party must comply with the removal statute. This Court, and all federal courts, should respect Congress' choice.

The decisions cited by Respondents demonstrate a lack of respect for state sovereignty and for congressional limitations on judicial power. The Eleventh Circuit in *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277, 282 (11th Cir. 1987), decided that remand was not necessary because of the novelty, complexity, and technicality of issues raised. Congress did not create an exception to the remand statute on these grounds, although it certainly could have done so. Congress could also have granted federal courts exclusive jurisdiction over the novel complex technical questions at issue in *Belasco*, if it believed state courts could not handle those issues. If Congress did not do so, courts should not ignore their statutory limitations to achieve that result.

Other courts have chosen to ignore the literal language of the removal statute, in favor of a liberal reading of the federal rules of civil procedure, and a general statute allowing amendments to cure defective allegations of jurisdiction, 28 U.S.C. Section 1653. *Barrow Development Co. v. Fulton Insurance Co.*, 418 F.2d 316 (9th Cir. 1969); *LaNeave v. North American Life Assurance Co.*, F. Supp. 1453 (D. Minn. 1986). However if, as all courts agree, the time limit for removal is not jurisdictional in nature, then Section 1653 is simply inapplicable. There is no basis for an untimely amendment designed to have additional parties join in or consent to a removal petition.

Ironically, in many of those cases, as in this case, courts deny the motion for remand citing the "great waste to judicial resources" which would result from remand. But the time limits the statute imposes are specifically designed to make sure that there is no waste of either state or federal judicial resources. If courts strictly apply the removal and remand statutes, as this Court's rules of statutory construction continually mandate, then the issue is decided within a short time of filing. By refusing to honor the statutory mandates, courts force the terrible waste of resources which they insist they are trying to avoid. They force the violations of one party's right to choose a state court forum in order to benefit parties which have otherwise failed to qualify for the right to choose a federal forum. Courts should not so cavalierly ignore the statutory limitations Congress has imposed, based upon its collective wisdom.

To the extent that Respondents' cases allow courts or defendants to waive a Plaintiff's statutory right to remand, these cases are clearly in conflict with the language of the statute, the vast majority of decisions on the issue and creates a conflict among the circuits.

CONCLUSION

For the reasons stated herein, this Honorable Court should grant certiorari, on either or both of the issues raised. Alternatively, this Honorable Court should summarily reverse the decision of the Ninth Circuit and order the case remanded to state court, or at least that all of Judge Lodge's orders be vacated and presented to another judge having no conflicts under Section 455.

RESPECTFULLY SUBMITTED this 19th day of April, 1996,

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